

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. ~~1924~~ 1925

No. ~~100~~ 250

38

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN  
COUNTY, ARKANSAS; M. B. CONATSER, F. W. GREER,  
ET AL., APPELLANTS,

vs.

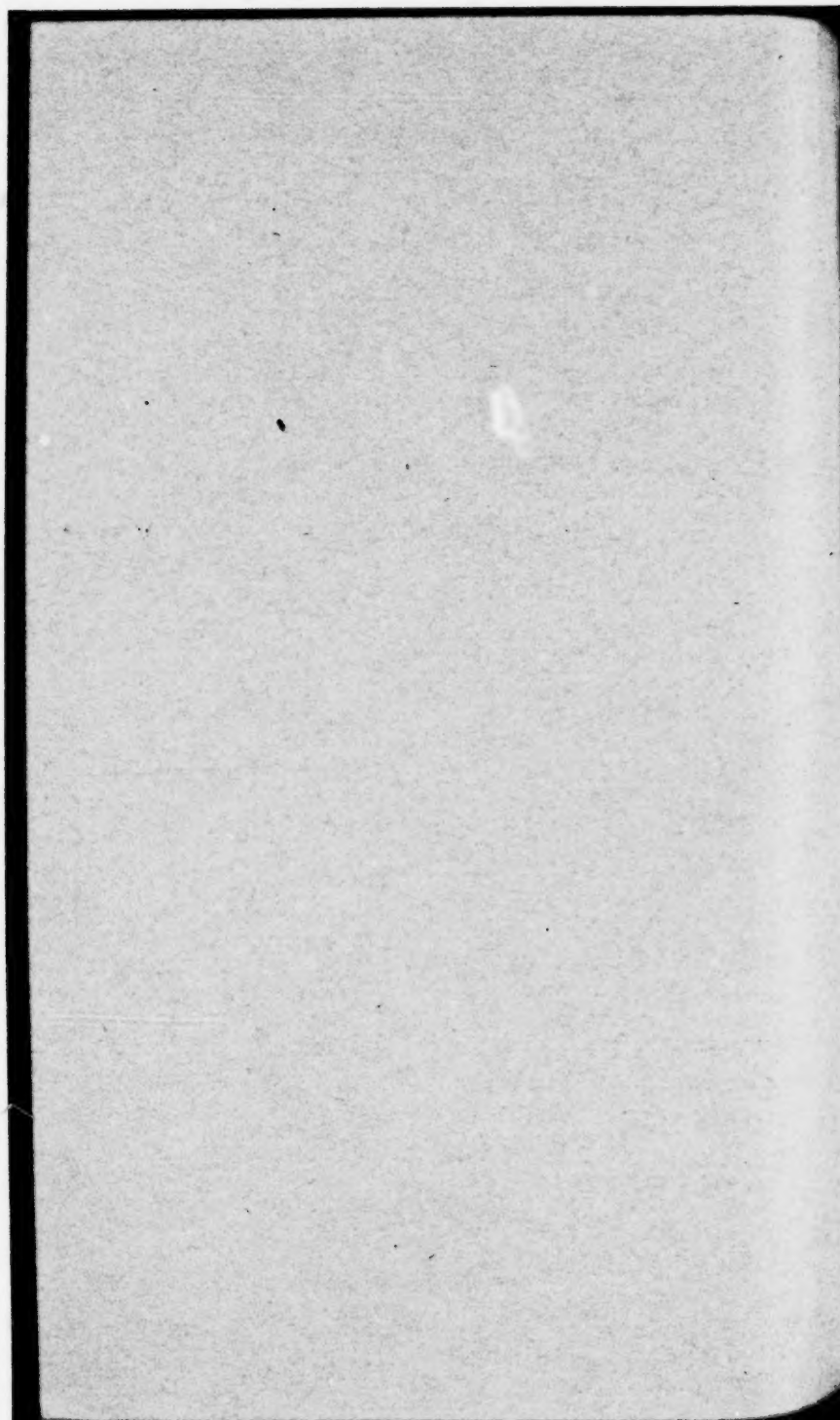
MISSOURI PACIFIC RAILROAD COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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FILED JANUARY 19, 1925

(30,817)





(30,817)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 852

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN  
COUNTY, ARKANSAS; M. B. CONATSER, F. W. GREER,  
ET AL., APPELLANTS,

*vs.*

MISSOURI PACIFIC RAILROAD COMPANY

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FOR THE EIGHTH CIRCUIT

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1 (Citation and Acknowledgment of Service.)

United States of America, To Missouri Pacific Railroad Company—Greeting:

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Arkansas, wherein Road Improvement District No. 1 of Franklin County, Arkansas, and M. B. Conatser, F. W. Greer and Jerome Wilson, Commissioners, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said Appellants, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Frank A. Youmans Judge of the District Court of the United States for the Western District of Arkansas, this 13th day of October in the year of our Lord one thousand nine hundred and twenty-three.

FRANK A. YOUNMANS,  
Judge United States District Court  
for the Western District of Arkansas.

Receipt of copy of within writ is hereby acknowledged and service thereof waived this Oct. 16th, 1923.

MISSOURI PACIFIC RAILROAD  
COMPANY

By Thomas B. Pryor, Attorney.

Endorsed: Filed in the District Court on Oct. 16, 1923.

2 ROAD IMPROVEMENT DISTRICT NO. 1, ETC., ET AL., VS.

2 District Court of the United States,  
Western District of Arkansas,  
Fort Smith Division.

Missouri Pacific Railroad Company, Plaintiff,  
No. 309. vs. Equity.

Road Improvement District Number One, of Franklin County, Arkansas, Jerome Wilson, E. R. Prothero, and Whit Martin, Commissioners, Defendants.

Record of proceedings in the District Court of the United States, for the Western District of Arkansas, Fort Smith Division, in the above entitled cause:

3 Amended and Substituted Bill in Equity.

(Filed in U. S. District Court December 14, 1922.)

In the United States District Court for the Western District of Arkansas, Fort Smith Division.

Missouri Pacific Railroad Company, Complainant,  
No. 309. vs. Equity.

Road Improvement District No. 1 of Franklin County, Arkansas, and M. B. Conatser, F. W. Greer and Jerome Wilson, Commissioners, Defendants.

Comes the Missouri Pacific Railroad Company, complainant, and for its amended and substituted complaint herein against the defendants, Road Improvement District No. 1 of Franklin County and M. B. Conatser, F. W. Greer and Jerome Wilson, Commissioners, states:

#### I.

That the Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri and is a citizen and resident of the said State of Missouri, and has its principal office in the city of St. Louis in said State, and is the owner of a railroad line extending through the states of Missouri, Illinois, Tennessee, Louisiana, Oklahoma, Kansas, Nebraska and Arkansas, and is engaged in the transportation of interstate commerce between said states.

#### II.

That the amount in controversy in this suit exceeds in value and amount the sum of \$3000.00 exclusive of interest and cost.

#### III.

That the defendants, Mr. B. Conatser, F. W. Greer and Jerome Wilson, who were the Commissioners of said Road Im-

provement District at the time the original complaint herein was filed and are residents and citizens of the said town of Ozark, Franklin County, Arkansas, and that M. B. Conatser was President, F. W. Greer, Secretary, and Jerome Wilson, Treasurer of said Road Improvement District. That since the filing of the original complaint herein the said M. B. Conatser has resigned and was succeeded by Whiton Martin, and that the said F. W. Greer resigned and was succeeded by E. R. Prothero, both the said Whiton Martin and the said E. R. Prothero being residents and citizens of the county of Franklin, State of Arkansas.

#### IV.

That complainant owns a line of railroad between the cities of Fort Smith and Little Rock, Arkansas, extending through the County of Franklin, in said state; that the road contemplated to be improved by said Act parallels the line of railroad of this complainant through said county, that a map showing the boundary line of said Road Improvement District and the location of said road to be improved and that portion of the railroad line and right of way of complainant within said Road Improvement District is hereto attached marked "Exhibit A" and made a part hereof.

#### V.

That the said Act of the Legislature of Arkansas creating said Road Improvement District, among other things, provides:

"Section 1. The lands hereinafter described, are hereby made an Improvement District for the purpose of building a highway in Franklin County, Arkansas, Jerome Wilson, Harley Russell and F. W. Greer are hereby named the Commissioners of said District to hold office for the term of six years and until their successors are elected and qualified in the manner hereinafter provided. They and their successors are hereby delegated to be a body corporate, under the style of "Road Improvement District No. 1, in Franklin County," with power to sue and be sued, and have a corporate seal, and do all things necessary to try to carry out the purpose of this Act.

"Not less than thirty days nor more than sixty days before the expiration of their term of office at a meeting of the board they shall elect three commissioners to succeed themselves, whose term of office shall be six years and who shall hold office until their successors are elected and qualified, which elec-

tion shall be done in the same manner as in this section provided for, all of whom shall be residents of Franklin County and property owners within the District, and thereafter the Commissioners of said District shall be maintained in succession in the same manner as the Board of Improvement for the preservation, maintenance of the highway herein contemplated."

5 "Section 3. All lots, blocks, and additions to Towns of Altus, Alix, Ozark, Denning, White Oak, Alston and other incorporated towns in the district, Franklin County, Arkansas, and all railroads and tramroads, telegraph and telephone lines and pipe lines, right of way situated in any of the lands of said district."

"Section 4. The Commissioners shall organize by electing one of its members as President, and by electing a Secretary and Treasurer. The Treasurer shall be required to give bond in such sum as the commission finds necessary. The commissioners may also employ such other officers and have the services of the County Engineers and other agents as they find essential and may fix their compensation."

"Section 8. As soon as said Board of Commissioners shall have formed a plan of improvement, and shall have ascertained the cost thereof, if they deem it expedient to make said improvement, they shall appoint three electors of the county, who shall constitute a Board for the assessment of the benefits to be received by the several and particular tracts of land, railroads, tramroads, telegraph lines, telephone lines and pipe lines within the district by reason of the proposed local improvement."

"Section 9. Each of the said Assessors shall, before entering on the discharge of his duties, takes an oath that he will well and truly assess to the best of his knowledge and ability, the value of all benefits to be received by each land owner by reason of the proposed improvements as affecting the lands, railroads and tramroads, telegraph lines, telephone lines within the District, each oath shall be filed with the Secretary of the Board of Commissioners, and such Board of Assessors shall make an assessment of all lands in said district in a book or books provided by the Board for that purpose. The said lands shall be entered upon said book or books in convenient subdivisions as surveyed by the United States Government, in appropriate columns, showing the names of the owners of said lands, a description of the lands, (the description to be in as large tracts as convenient,) the value of the benefits that will accrue to each tract by reason of the improvement."

"Section 10. The said assessors shall make their assessments at such times as they may be directed to do so by the Board of Commissioners, and shall place in the hands of the President of the Board of Commissioners their report of said assessment, thereupon the President of the Board shall cause a notice to be published in a weekly paper published in said county of Franklin for three insertions, describing the land assessed and calling on the land owners aggrieved by reason of the assessment to appear on the day therein named before the Board of Assessors at a place of meeting to be named in said notice for the purpose of having any wrongful or erroneous assessment corrected; that, after said notice shall have been given the assessors shall meet at the place named in said notice on the day mentioned therein, and shall hear any complaint of landowners and persons interested and adjust any errors or wrongful assessments, and their assessments as adjusted shall be the assessment of said road improvement district until the next assessment shall have been ordered by the Board of Commissioners. Any person, firm or corporation aggrieved by the action of the board of assessors fixing the assessment list as herein provided,

6 shall have a right for twenty days from the date of adjournment of said Board of Assessors sitting as a Board of Equalization as aforesaid to apply to any court of competent jurisdiction to set aside said assessment list or to correct any void or erroneous assessment thereon, but after the expiration of said twenty days the said list shall become final and incontestable either at law or in equity.

No jurisdiction or process shall issue to stay any work on said road, or the collection of any tax hereunder, unless the party therefor shall first enter into bond with good and sufficient security, to be approved by the Judge of the court granting same and payable to the Board of directors for the benefits of said board and of all persons interested, conditioned for the payment of all damages and costs as shall be sustained by granting same if wrongfully granted, nor shall any such injunction be granted except on ten days notice to President of the Board of Commissioners, which notice shall state the time and place of the application for said injunction."

"Section 11. The Commissioners may require the Assessors to revise their assessments not oftener than once per annum, increasing or diminishing the assessment against particular pieces of property as justice requires. Provided that the total amount of benefits shall not diminish if the district shall have borrowed money or incurred indebtedness. Notice



of the revised assessment shall be given as in case of the original assessment and it shall be equalized in the like manner."

"Section 12. The Secretary of the Board shall each year on or before the first day of December, make out and deliver to the collector of Franklin County, a book showing all the lands, railroads, tramroads, telegraph lines and pipe lines within the district, in parcels, as the same appear upon the county assessment books of Franklin County, the name of the owner there appearing and the amount of taxes to be collected for "Road Improvement District No. One in Franklin County", as levied by the Commissioners of said District, and it is made the duty of the Collector of said county to collect said taxes on or before the tenth day of April next after said assessment is turned over to him, and for his services the collector shall have and receive the same commission that he is allowed for collecting the taxes of the county and state, said taxes when collected, shall within sixty days be paid, over to the Treasurer of Road Improvement District No. 1".

"Section 16. All taxes levied under the terms of this Act shall be payable between the first Monday in December and the tenth day of April of each year; and if any taxes levied in pursuance to this act are not paid at maturity, the collector shall not embrace such tax in the taxes for which he shall sell the lands, but he shall report such delinquencies to the Board of Commissioners of said district, who shall add to the amount of the tax a penalty of twenty five per cent; and said Board of Commissioners shall enforce the collection by Chancery proceedings in any court having Chancery jurisdiction; and said court shall give judgment against said lands, railroads, tramroads, telegraph lines, telephone lines and pipe lines for the amount of such taxes, and said penalty of twenty-five per cent and interest on same from the end of said sixty days allowed for the collection thereof, at the rate of seven per cent (7%) per annum and all costs of the proceedings. Such judgments shall provide for the sale of said delinquent lands for cash, by Commissioner of the court, after advertising as hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings in rem. It shall be immaterial that the ownership of said lands be incorrectly alleged in said proceedings, and said judgment shall be enforced wholly against said lands, and not against any other property or estate of said defendant."

"Section 17. This law shall be liberally constructed to give to said assessment and tax lists the effects of bona fide mortgages for a valuable consideration, and a first lien upon

said lands, railroads, tramroads, telegraph lines, telephone lines and pipe lines, as against all persons having an interest therein."

"Section 18. All bonds issued by the Commissioner under the terms of this Act, shall be secured by a lien on all lands, railroads, and tramroads, telegraph lines, telephone lines and pipe lines in the district, with the right of priority in uncollected assessments provided for in the pledge of mortgage executed by the commissioners as security for such bonds, and the commissioners shall see to it that a tax is levied annually, and collected under the provisions of this Act, so long as it may be necessary to pay any bond issued or obligation contracted under its authority; and the making of said assessment or levy and collection may be enforced by mandamus."

## VI.

That the entire length of said road to be improved is 23.9 miles; that the following right of way of this complainant is embraced in said district, to-wit:

Main line	24.33 miles
Altus Branch,	6.93 miles
Coal Hill Branch,	1.98 miles

making a total of 33.24 miles of track; that the estimated cost of the improvement of said highway aggregates \$230,000.00; that benefit assessments have been levied against all property embraced in said district to the amount of approximately \$504,000.00 of which amount \$54,082.00, or approximately 10.7% has been assessed against the property of this complainant; that in addition to said original assessment the defendant Road Improvement District, acting through its Commissioners and Board of Assessors and under the provisions of Act 626, approved March 29, 1921, entitled "An Act for the relief of Road Improvement District No. 1 of Franklin County, for confirming the assessment of benefits therein and providing for changes therein, and providing for a referendum therein and for other purposes", increased the  
8 assessment of benefits against the property of this complaint in said district 40% or the sum of \$21,624.80, making the total assessment of benefits against the property of this complainant in said district \$75,686.80.

## VII.

That Section Ten of said Act 588 of the Acts of 1919, provides:

"Any person, firm or corporation aggrieved by the action of the Board of Assessors fixing the assessment list as herein provided, shall have a right for twenty days from the date of adjournment of said Board of Assessors sitting as a Board of Equalization as aforesaid to apply to any court of competent jurisdiction to set aside said assessment thereon, and after the expiration of said twenty days the said list shall become final and uncontestable either at law or in equity."

That said Board of Assessors acting under said Act, met at the town of Ozark, Franklin County, Arkansas, on July 7th, 1919, and continued in session as a Board of Equalization during the 7th and 8th of July 1919, and during their said session failed and refused to eliminate said assessment of benefits against the property of this complainant or to reduce the amount thereof and that said assessment of benefits as fixed by said Board of Assessors now appears against the property of this complainant upon the records of said Improvement District; that this complainant within the time allowed in said Section of said Act of the Legislature filed its complaint in this court.

That Section Twelve of said Act provides, that the Secretary of the Board shall each year on or before the first day of December make out and deliver to the Collector of Franklin County, a book showing all the lands, railroads, tramroads, telegraph lines, etc., within the district as the same appears upon the county assessment books of Franklin County, showing the name of the owner and the amount of the tax to be collected as levied by the Commissioners of said district, and it is made the duty of the Collector of said County to collect said taxes on or before the tenth day of April.

9      Said Road Will Deprive Railroad of Traffic.

That said highway when constructed will constitute a link in a highway extending between the said cities of Fort Smith and Little Rock, Arkansas; that said highway will deprive this complainant of revenue in passenger traffic between intermediate points and will also deprive this complainant of revenue arising from freight traffic, as motor trucks will be used for the transportation of freight between intermediate points on this complainant's railroad from Fort Smith to Little Rock; that the construction of said highway will hereby be a detriment instead of a benefit to the property of this complainant; that this complainant is engaged in the transportation of intrastate as well as interstate commerce; that it now enjoys both passenger and freight traffic between points on

its said line of railroad of which it will be deprived to a great extent when the system of highways contemplated are constructed between said cities; that the property of this complainant is not adaptable to any other use than that of a railroad line; that its right of way is not of any value for agricultural purposes; that its property in the Towns of Altus and Ozark located in said Road Improvement District and through which this complainant's line of railroad runs, is not adaptable to any other use than that of a right of way for its said railroad, and that its said property located in said district will not be benefitted, increased or enhanced in value by reason of the construction of said highway.

That the action of the Board of Assessors in making the original assessment and the action of the Legislature in passing Act 626 approved March 29, 1921, authorizing an increase in said assessment and confirming and validating the assessment made by said Board of Assessors was wholly unwarranted, unjust and inequitable, and is therefore unconstitutional and void and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides:

10 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

That the action of the Board of Assessors in increasing the assessment under the provisions of said Act of the Legislature against this complainant's property in said Road Improvement District was palpably arbitrary, wholly unwarranted, unjust and inequitable and in violation of Section 5, Article 6 of the Constitution of the State of Arkansas, which in part reads as follows:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

That all other property except that belonging to this complainant in said Road Improvement District is assessed upon an acreage or area basis and the property of this complainant is assessed upon a mileage basis for general taxation pur-

poses; that all other property in said district is assessed by the county Assessor of said county and is assessed at less than 50% of its value, while the property of this complainant is assessed by the Arkansas Tax Commission and its value for general taxation purposes is assessed at more than 60% of its value; that the assessment of benefits made by the Board of Assessors was made upon a valuation basis as the same appeared from the tax books in said county of Franklin; that said assessors did not take into consideration in assessing benefits against this complainant's property the effect that the construction of the road would have upon its business, or the value of its property, but arbitrarily made as the basis for the assessment of benefits of the valuation of its property as made by the State Tax Commission; that the State Tax

11 Commission in assessing the property of this complainant not only includes the value of its real property, but also personal property and the intangible property called the franchise, thereby imposing upon it a higher rate of taxation than all other property in the district, which is clearly in violation of the section of the Constitution of the United States, and of the State of Arkansas aforesaid.

## VIII.

### Burden Upon Interstate Commerce.

That complainant states that its said line of railroad and property in said District is used for the purpose of the transportation and movement of freight and passengers in the business of a common carrier for hire in interstate and intrastate commerce; that said property is not susceptible or adaptable to any other use and has no value for any other purpose and that the construction of the contemplated road improvement will not increase the traffic upon complainant's railway line, will not enhance the value of its property, and will in no way benefit the same; that the improvement contemplated will deprive this complainant of traffic and of revenues from such traffic and will be a detriment instead of a benefit to this complainant's property as aforesaid; that said assessment of benefits is in the nature of a tax and a burden upon interstate commerce and in conflict with Article 1, Section 8 of the Constitution of the United States, which grants to Congress the right to regulate commerce with foreign nations and among the several states.

## IX.

## Act Unconstitutional.

That said Act No. 588 creating said Road Improvement District is void and unconstitutional and in violation of Section Twenty-eight, Article Seven of the Constitution of the State of Arkansas, which provides:

12 "The County Court shall have exclusive original jurisdiction in all matters relating to county taxes, bridges, ferries, paupers, bastardy, vagrants and apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concern of the respective counties."

That Section One of said Act deprives the County Court of its jurisdiction over said road and places same in the hands of the Commissioners in perpetual succession "For the preservation, maintenance of the highway herein contemplated."

And in Section Five, it is further provided:

"That said Board of Commissioners shall have and they are hereby vested with power and authority, and it is hereby made their duty to build, construct, maintain and repair said road within said district as herein provided and to carry out the improvement herein contemplated, and in doing so shall expend all necessary sums of money authorized to be levied and collected under authority of this Act."

Contrary to said provisions of the Constitution.

## X.

That unless restrained by this court, the defendants will proceed in conformity with Section Twelve of said Act by having the Secretary of the Board make out and deliver to the Collector of Franklin County, a book showing the assessment of benefits against the property of this complainant in said District, and levy the same upon said property and the said Collector will thereafter attempt to collect the proportion of said taxes to be collected as provided by said Act.

## XI.

That complainant has no adequate remedy at law and will therefore suffer an irreparable loss and injury unless the defendants and each of them are restrained and enjoined from delivering to the Collector of Franklin County a list or book showing said assessment of benefits levied against the prop-

erty of this complainant and the amount of taxes to be collected for said road improvement district No. 1 in Franklin County.

## XII.

That after the filing of the original bill of complaint herein, the Commissioners of Road Improvement District  
13 No. 1 of Franklin County, Arkansas, acting for the defendant Road Improvement District and themselves, made a written proposal to this complainant in which they proposed to accept and to make the assessment of benefits against this complainant's property in said Road Improvement District on a basis of Two Hundred Fifty Dollars (\$250.00) per mile; a copy of said proposal being attached here to marked "Exhibit B" and made a part hereof.

## XIII.

That said proposition was transmitted by letter from defendant, M. B. Conatser, President of said Board of Commissioners, to the attorney for this complaint on the 22nd day of November, 1919, a copy of said letter is hereto attached marked "Exhibit C" and made part hereof.

That this complainant through its said attorney on the 28th day of November, 1919, notified said defendants that said proposition was accepted; copy of said acceptance is hereto attached marked "Exhibit D" and made a part hereof; that afterwards relying upon said agreement, this complainant dismissed its original bill of complaint in this court, which was reinstated by this court on the first day of April 1920. That after the said proposition was made and accepted this complainant tendered to the defendant, S. S. Crawford, Sheriff and Collector of Franklin County, the payment of its taxes due to said Road Improvement District for the year 1919, according to said agreement, which the said defendant S. S. Crawford, Sheriff and Collector, refused to accept, assigning as a reason therefor that the amount extended on the books of the said Road Improvement District which had been delivered to him, as provided in said Act, had not been changed in accordance with said agreement; that he had no authority to accept a less amount than shown upon said books. That the defendant's attention was called to the fact that the amount extended upon the tax books had not been changed to conform with the amount agreed upon, and said defendants, although  
14 requested to have said amount so changed, has failed and refused to make any correction or change of the amount extended on the tax books in violation of said agreement.



## XIV.

That under the provisions of Section Twelve of said Act, as set forth in the original Bill herein, the Secretary of the Board on or before the first day of December, 1919, made out and delivered to the Collector of Franklin County a book showing all lands and railroads, and the amount of taxes to be collected from the owners thereof for said Road Improvement District No. 1 of Franklin County, as levied by the Commissioners of said District, and that it is made the duty of the Sheriff and Collector to report to the Commissioners of said district any and all delinquencies in the payment of said taxes and the said Commissioners are authorized to add to the amount of the taxes a penalty of 25% and that the said Sheriff and Collector having in its possession the books of said defendant Road District upon which were extended an installment of the taxes assessed against this complainant's property, and this complainant on the .... day of April, 1920, filed an amendment to its original bill of complaint herein, making S. S. Crawford, Sheriff & Collector party defendant, and praying that a restraining order be issued to restrain him from attempting to collect said taxes extended against this complainant's property in said Road Improvement District, and said restraining order was issued by this court on the .... day of April, 1920.

## XV.

That said Act No. 588 of the Acts of the Legislature of Arkansas of 1919, and the said Act, No. 626, approved March 29, 1921, are unconstitutional and void. That section One of said Act 626, approved March 29, 1921, provides:

15    "That the assessment of benefits heretofore made in Road Improvement District No. 1 of Franklin County under the terms and provisions of Act No. 588 of the Acts of the General Assembly of the State of Arkansas for the year 1919, approved April 1, 1919, and approved by the County Court of Franklin County on the 9th day of August, 1919 be and the same is hereby found to be fair, equitable and just, as made, and is hereby in all things confirmed, and declared to be the benefits accruing to the property therein assessed by reason of the improvement as contemplated at that time. The same being as against the Missouri Pacific Railroad Company, the sum of Fifty Four Thousand and Sixty-two (\$54,062.00) Dollars; Western Union Telegraph Company \$625.00; Home Telephone Co. \$500.00, Commonwealth Public Service Company \$3,125.00, Sanbeau Mine \$250.00, Denning Domestic

Coal Company \$250.00; Meece & Hackney Coal Company, \$375.00; Mansfield & Kindrick Coal Company, \$500.00; Dotson Mines Nos. 1 and 2, \$750.00; Western Coal & Mining Company Mines Nos. 2 and 6, \$750.00; Denning Coal Company \$625.00; Ozark Coal Company \$250.00; Harbottle Bailey Coal Company, \$188.00; Liberty Coal Company \$125.00; Wallace McKinney Coal Company, \$375.00; Southwestern Bell Telephone Company, \$1,000; Alix Gin Company \$313.00; and as against the several tracts of land not herein specifically mentioned as shown on said assessment as filed and approved as aforesaid.

That Section Two of said Act provides as follows:

“Provided, further, that if it be necessary by reason of any widening of the road or from other cause to change said assessment of benefits, the commissioners shall cause same to be done in the same manner as provided in said Act No. 588 for the making of the original assessment; and if in order to complete said improvement it shall become necessary to raise additional money, and provide an additional assessment of benefits therefor, the Commissioners of said District are hereby authorized, directed and empowered, to cause said additional assessment of benefits to be made, not in amount, however, to exceed fifteen per cent of the assessed valuation of the real property in said district; said additional assessment, if found necessary, shall be made in the same manner and with like effect, as provided in said Act No. 588 for the original assessment.”

That said Board of Commissioners of said Road Improvement District acting under the authority of said Section Two of said Act, caused an increase to be made in the assessment of benefits as made against the property of this complainant within the district and the Board of Assessors arbitrarily, unjustly and inequitably increased the assessment of benefits against the property of this complainant in the sum of \$21,624.80, making a total assessment of \$75,686.80 as aforesaid.

16 That the said Board of Assessors gave notice that they would hear any protests or objections to any increase in said assessments on the 15th day of September 1921, at Ozark, Arkansas; that on said day a representative of this complainant appeared before said Board and protested the increase in the assessment of benefits as made by said Board of Assessors and said protest was by the said Board of Assessors overruled.

That within the time allowed by the original act in which to appeal to the court after the action of the Board of Asses-

sors in making the increase in said assessment under the provisions of said Act of the Legislature, this complainant on the ..... day of September, 1921, filed an amendment to the original bill herein.

That the action of said Board of Assessors in making the increase in the assessment of benefits against the property of this complainant was palpably arbitrary and wholly unwarranted and said increase in said assessment was made without any regard to the effect the building or construction of said road would have upon this complainant's property.

That this complainant's property is not and will not be benefitted by the construction of said road or any part thereof. That its property will not be enhanced in value by reason of said improvement and that it will not in any way facilitate the operation of the trains over this complainant's line of railroad between Little Rock and Fort Smith, but to the contrary will have a detrimental effect in that the traffic passing over said line, both passenger and freight, will be materially reduced and this complainant will be deprived of the revenue which it would have received from such traffic to its great detriment and damage.

17 That said increase in said assessment was made in total disregard of the contract entered into between complainant and the Commissioners of said Road Improvement District, whereby it was agreed in settlement of the controversy existing between this complainant and said Road Improvement District that as to the benefits that would accrue to the property of this complainant that such benefits would not exceed the sum of \$250.00 per mile.

#### XVI.

That said Act of the Legislature attempting to confirm the benefits as originally made against the property of this complainant and authorizing an increase in the assessment of benefits is palpably arbitrary, discriminatory, unconstitutional and void, in this:

A. Because no notice of intention to apply for the passage of such Special Act was published in the locality where the matter or thing to be affected was situated for thirty days or any other time prior to the introduction in the General Assembly of such bill, and no evidence of any notice having been published was exhibited in the General Assembly before such Act was passed, and the Act is unconstitutional because in violation and contrary to the provisions of Section 26,

Article 5 of the Constitution of the State of Arkansas, which provides that such notice shall be published at the place and for the time mentioned and evidence of its publication shall be exhibited in the General Assembly and the action and judgment of the Supreme Court of Arkansas in its various declarations which have thereby become the laws of the State, that the Legislature is sole judge whether this provision of the State Constitution has been complied with and if the Legislature shall choose to disregard such provision and pass a local or special bill without notice having been published no issue upon the subject can be raised in the courts as violative of and contrary to Section 1, Article 14 or the Fourteenth Amendment to the Constitution of the United States, which provides, that no State shall deprive any person of life, liberty or property without due process of law.

18 B. Because it violates Article 1, Section 10 of the Constitution of the United States, which provides, no state shall pass any law impairing the obligation of contracts, and also Section 17, Article 2 of the Constitution of the State of Arkansas, which provides "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall ever be passed." That this complainant had a contract with the Commissioners of said defendant, Road Improvement District which is referred to in its amendment to bill of complaint filed herein, and under said contract it was agreed that the benefits to this complainant's property would not exceed the sum of \$250.00 per mile or a total sum of \$8,310.00. That said Act of the Legislature attempting to confirm said original assessment of benefits ignores said contract and impairs its obligation.

C. Because said Act is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall deny to any person within its jurisdiction the equal protection of the law," and which also provides that "No state shall deprive any person of life, liberty or property without due process of law." That this complainant's property would not be benefitted by the construction of improvement of said road; that said road if improved would be a detriment instead of a benefit to this complainant's property in said Road Improvement District, in that it would deprive this complainant of both freight and passenger traffic, and therefore said assessment of benefits against its property would be and is confiscatory and would deprive it of its property without due process of law.

D. Because it violates the provisions of Section 22, Article 2 of the Constitution of State of Arkansas, which provides: "The right of property is before and higher than any constitutional sanction, and private property shall not be taken, appropriated or damaged for public use without just compensation therefor." That said Act provides that the Commissioners may increase the assessment of benefits to any extent they may deem advisable "Not to exceed fifteen per cent of the assessed valuation of the real property within said District." That the Assessors in revising the assessment arbitrarily and unwarrantedly increased the assessment of benefits forty per cent of the original assessment of benefits that had been made by the Board of Assessors without any regard to any possible increase in benefits that would accrue to said property.

And also in violation of said Section One of the Fourteenth Amendment to the Constitution of the United States in that the said assessment of benefits were confirmed and the power given to said defendants to increase the same regardless of any benefits that would accrue to the property in said district.

Because said Act of the Legislature violates and is contrary to Sections One and Two of Article Fourteen of the Constitution of the State of Arkansas, which provides, "The powers of the Government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body or magistrate, to-wit, those which are legislative to one, those which are executive to another, and those which are judicial to another," and also provides, "No person or collection of persons being of one of those departments shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

That the legislature in passing said Act transcended its authority by attempting to find that the assessment of benefits that were made in said district "is hereby found to be fair, equitable and just as made and is hereby in all things confirmed and declared to be the benefits accruing to the property therein assessed," when the original Act provided an appeal to the courts for the purpose of determining the fairness and justness of said assessment of benefits. That said defendants and said Commissioners knew at the time that they caused said act to be introduced and passed by the legislature that a suit was pending in this court in which the

issue was involved as to the fairness and justness of said assessment, and was an attempt to deprive this complainant of its property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

### XVII.

That said Act No. 588, approved April 1, 1919, creating said Road Improvement District, is also unconstitutional and void, because in violation and contrary to the provisions of Section 26, Article 5 of the Constitution of the State of Arkansas, which provides that notice shall be published at the place and time mentioned and evidence of its publication shall be exhibited in the General Assembly and for the further reasons hereinbefore specifically alleged in subdivision (a) of paragraph 17 on the said grounds therein stated in this paragraph is reiterated and adopted.

### XVIII.

That said assessment made originally by the Assessors, together with the increase thereof made under the provisions of the act herein before referred to is unjust, inequitable, excessive, exorbitant, palpably arbitrary, a flagrant abuse of the powers of the Assessors under both of said Acts for the reasons hereinbefore stated, and that complainant herein is aggrieved by the action of said Board of Assessors in making the said assessment.

Wherefore, complainant prays:

### I.

That said Act No. 588 creating Road Improvement District No. 1 of Franklin County be declared unconstitutional and void:

(a) That said Act No. 626 approved March 29, 1921, entitled an Act for the relief of Road Improvement District No. 1 of Franklin County be declared unconstitutional and void.

21 (c) That the assessment of benefits against the property of this complainant in said Road Improvement District be cancelled, set aside and held for naught, or that the said contract heretofore referred to herein be declared valid and that the assessment of benefits against the property of this complainant be made at and for the amount named in said contract.

(d) That the temporary restraining orders heretofore issued herein be made perpetual and that the defendants and

each of them be perpetually enjoined and restrained from attempting to collect any part or portion of said assessment made or any increase thereof as against the property of this complainant and that this complainant have all other and further relief to which it may be in equity and good conscience entitled.

MISSOURI PACIFIC  
RAILROAD COMPANY,  
By Vincent M. Miles,  
Thos. B. Pryor, Its Solicitors.

State of Arkansas,  
County of Sebastian—ss.

Thos. B. Pryor, being duly sworn states that he is one of the solicitors for the complainant in the above cause and that the statements contained in the above and foregoing amended and substituted bill in equity are true, as he verily believes.

THOS. B. PRYOR,

Subscribed and sworn to before me this 13th day of December,  
1922.

F. H. FENNESSY,  
Notary Public.

(Notarial Seal)

My commission expires: Jany. 12, 1924.





22      (Exhibit A, Map showing proposed Road District No.  
             1 of Franklin County, Arkansas.)

) ROAD IMPROVEMENT DISTRICT NO. 1, ETC., ET AL., VS.



23

## Exhibit "B".

Ozark, Arkansas, November 20, 1919.

Mr. T. B. Pryor,  
General Atty. for M. O. P.,  
Fort Smith, Arkansas.

We, the undersigned Commissioners of Road Improvement District No. One of Franklin County hereby agree to accept from the Missouri Pacific Railway Company as assessment of benefits in the construction of said improvement against said company the sum of Two Hundred and Fifty (250.00) Dollars per mile, which mileage includes the main line through Franklin County, and the line from Ozark Junction via Denning to Johnson County line connecting Denning Yard and Coal Hill. The said assessments of benefits to be paid by said company as other assessments are paid. This offer and agreement to be governed by Act No. 588 of the Acts of Arkansas for the year 1919. This offer is open for 15 days from date.

Given under our hands this 20th day of November, 1919.

M. B. CONATSER, Chr.  
JEROME WILSON, Treas.  
F. W. GREER, Secy.  
Commissioners of Road Improve-  
ment District No. One of Franklin  
County, Arkansas.

(Seal)

24

## Exhibit "C".

Road Improvement District No. 1 of Franklin County.

M. B. Conatser, Pres. F. W. Greer, Sec.  
Jerome Wilson, Treas.

Ozark, Arkansas.  
11/22/19/

T. B. Pryor,  
Fort Smith, Arkansas.

Dear Sir:

Please find herewith statement of agreement with J. S. Turner,

Yours truly,

M. B. CONATSER, Chr.

## Exhibit "D".

Fort Smith, Ark. Nov. 28, 1919.

Mr. M. B. Conatser, Chairman,  
Board of Commissioners, Franklin  
County Road Improvement Dist. No. 1,  
Ozark, Arkansas.

Dear Sir:

Referring further to your proposition dated November 20, 1919, in which you proposed to settle the question of the assessment of benefits against the property of the Missouri Pacific Railroad Company at the sum of Two Hundred and Fifty Dollars per mile.

Beg to advise that this matter has been submitted to the Engineering Department of our company and also to our General Solicitor and I am authorized and do hereby accept your proposition.

Would suggest that you have your attorney call at my office the next time he is in Fort Smith and we can prepare decree in the Federal Court accordingly.

Yours truly,

General Attorney.

TBP-F

## Motion to Dismiss Complaint.

(Filed in U. S. District Court December 14, 1922.)

Comes the defendants and move the court to dismiss the Amended and Substituted Bill and each separate paragraph thereof herein for the reason that said Amended and Substituted Bill does not state facts sufficient to constitute a cause of action in favor of the plaintiffs against the defendants or either of them nor does any paragraph thereof state such facts.

Wherefore defendants pray that the Amended and Substituted Bill be dismissed, with cost.

ROAD IMPROVEMENT DISTRICT  
No. 1, OF FRANKLIN COUNTY,  
ARKANSAS, et al.  
By J. H. Evans,  
Dave Partain,  
G. C. Carter,  
Solicitors for defendants.

## Answer.

(Filed in U. S. District Court December 14, 1922.)

Come the defendants, Road Improvement District Number One of Franklin County, Arkansas, and M. B. Conatser, F. W. Greer, and Jerome Wilson, Commissioners, and not waiving any of their rights under motion to dismiss filed herein, but saving said motion, and insisting thereon, for their answer to plaintiffs amended and substituted bill say:

## I.

That defendants admit the allegations contained in paragraphs one, two, three and four of plaintiffs Bill.

## II.

Defendants admit the allegations as to the provisions of certain sections of the Act of Legislature creating defendant Road Improvement District as set out in paragraph five of plaintiffs bill.

## III.

The defendants deny that the plaintiff has a total of only thirty three and twenty four hundredths miles of track in said district, but alleges the truth to be that it has approximately forty two miles of track in said district; defendants deny that the estimated cost of the improvement of said highway aggregates \$230,000.00, but alleges that the aggregate cost thereof is approximately \$400,000.00; defendants

admit that under the original assessment the amount of \$54,082.00 was assessed against the property of the plaintiff, and admit that under the provisions of Act Number 626 approved March 29th, 1921, that the Board of Assessors increased the assessment of benefits against the property of the plaintiff in the sum of \$21,624.80, making a total assessment of benefits against the property of the plaintiff in said district, \$75,686.80.

## IV.

Defendants deny that said Highway when constructed will constitute a link in a highway extending between the said city of Fort Smith and Little Rock, Arkansas; deny that said highway will deprive the plaintiff, of revenue in passenger traffic between the intermediate points, and deny that it will deprive the plaintiff of revenue arising from freight traffic, and deny that motor trucks will be used for the transportation of freight between intermediate points on plaintiffs railroad

from Fort Smith to Little Rock, and deny that the construction of said highway will thereby be a detriment instead of a benefit to the property of the plaintiff; deny that the plaintiff now enjoys both passenger and freight traffic between points on its said lines of railroad of which it will be deprived to a great extent when the system of highways contemplated are constructed between said cities; deny that the property of the plaintiff is not adaptable to any other use than that of a railroad line, that its right of way is not of any value for agricultural purposes, that if property in the towns of Altus and Ozark, located in said road improvement district, and through which its line of railroad runs is not adaptable to any other use than that of a right of way for its said railroad, and deny that its said property located in said district will not be benefitted, increased, or enhanced in value, by reason of the construction of said highway.

29 Defendants deny that the action of the Board of Assessors in making the original assessment and the action of the Legislature in passing Act Number 626, approved March 29, 1921, authorizing an increase in said assessment and confirming and validating the assessment made by said Board of Assessors, was wholly unwarranted, unjust and inequitable; and deny that it is therefore unconstitutional and void, and in violation of Section one of the 14th amendment of the Constitution of the United States.

Defendants deny that the action of the Board of Assessors in increasing the assessment under the provisions of said Act of the Legislature against the plaintiffs property in said road improvement district, was palpably arbitrary, wholly unwarranted, unjust, or inequitable, and in violation of Section Five, Article Six, of the Constitution of the State of Arkansas, or any part thereof.

Deny that all other property, except that belonging to the plaintiff in said road improvement district, is assessed upon an acreage or area basis, and that the property of the plaintiff is assessed upon a mileage basis for general taxation purposes; deny that all other property in said district is assessed by the county assessor of said county and is assessed at less than sixty per cent of its value; deny that the assessment of benefits made by the Board of Assessors was made upon a valuation basis as the same appeared from the tax books in said county of Franklin; that said assessors did not take into consideration in assessing benefits against the plaintiffs property, the effect that the construction of the road would have upon its business, or the value of its property, but arbitrarily



made as the basis for the assessment of benefits the valuation of its property as made by the State Tax Commission; deny that the State Tax Commission in assessing the property of the plaintiff not only includes the value of its real property, but also the intangible property called the franchise, thereby imposing upon it a higher rate taxation, than all other property in the district, which is clearly in violation of the section of the constitution of the United States and of the State of Arkansas aforesaid.

## V.

Defendants deny that plaintiffs property in said district is not susceptible or adaptable to any other use, or has no value for any other purpose than the transporation and movement of freight and passengers in the business of a common carrier for hire in interstate and intra state commerce; and deny that the construction of the contemplated road improvement will not increase the traffic upon plaintiffs railway line or will not enhance the value of its property, or will in no way benefit the same; deny that the improvement contemplated will deprive the plaintiff of traffic and of revenue from such traffic and will be a detriment instead of a benefit to plaintiffs property; deny that said assessment of benefits is in the nature of a tax and a burden upon interstate commerce and in conflict with Article one, Section eight, of the Constitution of the United States, which grants to Congress the right to regulate commerce with foreign nations and among the several states.

## VI.

Deny that said Act number 588 creating said road improvement district is void or unconstitutional, or in violation of section twenty eight, Article Seven, of the State of Arkansas.

Deny that Section one of said Act, deprives the county court of its jurisdiction over said road and places same in the hands of commissioners in perpetual succession, "For the preservation, maintenance, of the highway herein contemplation.

## VII.

31 Deny that the plaintiff has no adequate remedy at law, and will therefore suffer an [irreparable] loss and injury, unless the defendants and either of them are restrained and enjoined, from delivering to the collector of Franklin County, a list or book, showing said assessment of benefits levied against the property of the plaintiff, and the amount of taxes to be collected for said road improvement district.

## VIII.

Deny that after the filing of the original bill of complaint herein the commissioners of road improvement district number one of Franklin County, Arkansas, acting for the defendant road improvement district, and themselves, made a written proposal, to the plaintiff, in which they proposed to accept and to make the assessment of benefits against plaintiffs property in said improvement district on a basis of \$250.00 per mile.

## IX.

Deny that said Act number 588 creating said road improvement defendant M. B. Conatser, President of said board of Commissioners, to the attorney for the plaintiff, on the 22nd day of November, 1919; deny that the plaintiff through its said attorney, on the 28th day of November, 1919, notified said defendant, that said proposition was accepted; that afterwards relying upon said agreement, the plaintiff dismissed its original bill of complaint in this court; deny that after said proposition was made and accepted the plaintiff tendered to the defendant, S. S. Crawford, Sheriff and Collector of Franklin County the payment of its taxes due to said road improvement district for the year 1919, according to said agreement; but admit that the amount extended on its books of the said road improvement district which had been delivered to said collector [was] provided in said act had not been changed and that the defendant Crawford had no authority to accept a less amount [that] shown upon said book; the defendants allege that the said commissioners had no right or authority to make or enter into any such agreement as alleged; that no such agreement for the reduction of plaintiff's assessment was made or approved by the Board  
32 of Assessors of said District who under the provisions of said act creating said district were the sole and only assessing authority therein, and that the commissioners had no power or control over same; and defendants further allege that any such agreement, if made, whereby the assessment of benefits duly made by the assessors of said district against the property of the plaintiff would be reduced to an amount for less than that assessed against the property of other tax payers in said district would be void and unconstitutional and against public policy.

## X.

The defendants admit the making out and delivery to the collector of Franklin County of a book showing the amount of taxes assessed by the Board of Assessors against the prop-

erty of the plaintiff and all other property in said district as alleged in paragraph number 14 of plaintiff's bill.

### XI.

Defendants deny that said Act Number 588 of the Acts of the Legislature of Arkansas, of 1919, and the said Act Number 622, approved March 29th, 1921 or either of them, are unconstitutional or void; defendants admit that acting under the authority of said acts [and] increase was caused to be made in the assessment of benefits as made against the property of the plaintiff within the district, but deny that the board of assessors arbitrarily, unjustly, or inequitably, increased the assessment of benefits against the property of the plaintiff; defendants deny that the action of said board of assessors in making the increase in assessment of benefits against the property of the plaintiff was palpably arbitrary, or wholly unwarranted, and deny said increase in said assessment [as] made without any regard to the effect the building or construction of said road would have upon the plaintiffs property.

33 Deny that the plaintiffs property is not and will not be benefitted by the construction of said road, or any part thereof; deny that its property will not be enhanced in value by reason of said improvement and deny that it will not in any way facilitate the operation of the trains over the plaintiffs line of railroad between Little Rock and Fort Smith; deny that it will have detrimental effect in that the traffic passing over said line, either passenger or freight, will be materially reduced, and that plaintiff will be deprived of the revenue which it would have received from such traffic to its detriment or damage.

Deny that said increase in said assessment was made in total disregard of the contract entered into between the plaintiff and the commissioners of said road improvement district, whereby it was agreed in settlement of the controversy existing between the plaintiff and said improvement district, that as to the benefits that would accrue to the property of the plaintiff as such benefits would not exceed the sum of \$250.00 per mile.

### XII.

Deny that said Act of the Legislature, attempting to confirm the benefits as originally made against the property of the plaintiff and authorizing [and] increase in the assessment of benefits is palpably arbitrary, discriminatory, un-

constitutional, or void, in any of the particulars alleged, to wit: ("A") Because no notice of intention to apply for the passage of such Special Act was published in the locality where the matter or thing to be affected was situated for thirty days or any other time prior to the introduction in the General Assembly of such bill, or that no evidence of any notice having been published was exhibited in the general assembly before such act was passed; deny that the act is unconstitutional because in violation and contrary to the provisions of Section twenty six, Article five, of the constitution of the state of Arkansas, which provides that such notice

34 shall be published at the place and for the time mentioned and evidence of its publication, shall be exhibited in the General Assembly; and deny that the action and judgment of the Supreme Court of Arkansas, in its various declarations which have thereby become the laws of the State, that the Legislature is the sole judge whether this provision of the state Constitution has been complied with, and if the Legislature shall choose to disregard such provision and pass a local or special bill without notice having been published no issue upon the subject can be raised in the courts as violative of and contrary to Section one, Article 14 of the 14th amendment to the Constitution of the United States.

("B") Deny that it violates Article one, Section 10 of the constitution of the United States, which provides no state shall pass any law impairing the obligation of contracts, or Section 17, Article 2 of the Constitution of the State of Arkansas, which provides that no bill of Attainder, Expost Fact Law, or law impairing the obligation of contracts shall ever be passed; deny that the plaintiff had a contract with the commissioners of said defendant road improvement district under which it was agreed that the benefits to the plaintiffs property would not exceed the sum of \$250.00 per mile, or a total sum of \$8,310.00; deny that said Act of the Legislature confirming said original assessment of benefits ignores said contract, and impairs its obligations; and defendants allege that after the date upon which it is alleged said contract was made, valuable, important, and highly beneficial and expensive changes and improvement in said highway as originally contemplated, were necessarily made.

("C") Deny that said Act is in violation of Section one of the 14th amendment to the Constitution of the United States; deny that the plaintiffs property would not be benefited by the construction or improvement of said road; deny

that said road as improved would be a detriment instead of a benefit to plaintiffs property in said district in that it  
35 would deprive plaintiff of both freight and passenger traffic; and deny that therefore said assessment of benefits against its property would be and is confiscatory or would [deprive] it of its property without due process of law.

("D") Deny that it violates any of the provisions of Section Twenty-two, Article Two of the Constitution of the State of Arkansas; deny that the assessors in revising the assessment arbitrarily or unwarrantedly increased the assessment of benefits forty per cent of the original assessment of benefits that had been made by the Board of Assessors without any regard to any possible increase in benefits that would accrue to said property; deny that it is in violation of said Section one of the 14th amendment to the Constitution of the United States in that the said assessment of benefits were confirmed and the power given to said defendants to increase the same regardless of any benefits that would accrue to the property in said district; deny that said act of the Legislature violates or is contrary to Sections one or two, Article 14 of the Constitution of the State of Arkansas.

Deny that the Legislature in passing said act transcended its authority by attempting to find that the assessment of benefits that were made in said district, "Is hereby found to be fair, equitable, and just as made and is hereby in all things confirmed and declared to be the benefits accruing to the property therein assessed", and deny that the passage of said Act was an attempt to deprive the plaintiff of its property without due process of law in violation of any provision of the constitution of the United States.

### XIII.

Defendants deny that said Act number 588 creating said road improvement district is unconstitutional or void, because in violation or contrary to the provision of Sec-  
36 tion twenty-six, Article five, of the Constitution of the State of Arkansas, which provides that notice shall be published at the place in time mentioned and evidence of its publication shall be exhibited in the General Assembly, or for the reasons specifically alleged in subdivision "A" of paragraph Seventeen of Plaintiffs bill.

### XIV.

Deny that said assessment made originally by the Assessors together with the increase thereof, made under the provision, of the Act hereinbefore referred to is unjust, inequita-

ble, excessive, exorbitant, palpably arbitrary, or a flagrant abuse, of the powers of the assessors, under both of said acts, or that the plaintiff is aggrieved by the action of said Board of Assessors, in making the said assessment.

### XV.

The defendants allege the truth to be that each of said Acts of the Legislature are, in all things, constitutional and valid, and that the assessment against the plaintiffs property have been justly and fairly made thereunder; that the assessment of benefits both in the original and in the re-assessment of benefits against plaintiffs property were made upon the same basis as that made against all of the other property in said district, and that no different basis for arriving at the amount of benefits was used as against plaintiffs property and that of the other property of the district.

### XVI.

That subsequent to the date when plaintiff alleges a purported agreement was entered into between plaintiff and defendant as to the assessment against plaintiffs property, extensive and valuable changes and improvements were made in the construction of said highway, thereby increasing materially the benefits to all property in the district; that in the re-assessment the property of the plaintiff and all other  
37 property in the District, was re-assessed, equally, and upon the same basis as to benefits; that the said road is not a link in a highway from Little Rock to Fort Smith, but on the contrary there is no improved highway through Crawford County on the West, or Johnson County on the East, and no probability that there will be for many years to come, so that in effect the said highway in the defendant district is not a parallel road but one leading into the towns of Mulberry, Ozark, Altus, and Denning Yards, on plaintiffs line of railroad, which will have the effect of greatly improving the country through and near which it goes, and thereby increasing both the passenger and freight traffic of the defendant railroad.

### XVII.

The defendants allege, that the construction and improvement of said highway has greatly increased the traffic over plaintiff line of railroad in said district; that as a direct result the said road District and those connected with said highway, have paid to the defendant approximately \$75,000.00 in freight for material, and supplies, transported by plaintiff over its

said line of railroad; that the building and improving of said highway, is a benefit to plaintiffs property and will continue so to be.

Wherefore, the defendants having fully answered, pray that plaintiffs bill be dismissed, that the assessment of benefits against plaintiffs property, be and in all things confirmed, and sustained, and that the temporary restraining order heretofore issued be dissolved and set aside, and that they be discharged with cost.

ROAD IMPROVEMENT DISTRICT  
NUMBER ONE OF FRANKLIN  
COUNTY, ARKANSAS.

By J. H. Evans, Dave Partain, G. C.  
Carter, Solicitors for Defendants.

State of Arkansas,  
County of Sebastian.

38 E. R. Prothero, being duly sworn, states that he is one of the defendants in this suit; that he is secretary and one of the Commissioners of the defendant Road Improvement District No. One of Franklin County, Arkansas, and that the facts set forth in the foregoing answer are true and correct as he verily believes.

E. R. PROTHERO.

Subscribed and sworn to before me this 14th day of December, 1922.

WM. S. WELLSHEAR, Clerk.

39 Amendment to Amended and Substituted Bill in  
Equity.

(Filed in U. S. District Court February 28, 1923.)

Comes the complainant, Missouri Pacific Railroad Company, and for amendment to its amended and substituted bill of complaint herein, states:

That since the filing of the amended and substituted bill of complaint herein, the Commissioners of Road Improvement District No. 1 of Franklin County, Arkansas, have had introduced and passed by the Legislature of the State of Arkansas, a bill entitled—

“An Act for the relief of Road Improvement District No. 1 of Franklin County, Arkansas; to validate the creation and establishment of said district; to fix, confirm, establish, approve and declare tracts of land, railroads and tramroads,



telegraph lines, telephone lines, electric lines, and pipe lines within said district by reason of the local improvement therein and for other purposes."

That Section 1 of said Act provides:

"That the creation, formation and establishment of road improvement district No. 1 of Franklin County, Arkansas, under and by virtue of the terms and provisions of Act No. 588 of the Acts of the General Assembly of the State of Arkansas for the year 1919, approved April 1, 1919 be and the same is hereby in all things confirmed, validated and approved."

That Section 2 of said Act provides:

"That the assessment of benefits as against the several and particular tracts of land, railroads and tramroads, telegraph lines, telephone lines, electric lines, and pipe lines, in said district as reassessed, under the terms and provisions of Act No. 626, of the Acts of the General Assembly of the State of Arkansas for the year 1921, approved March 29, 1921, the same being entitled, "An Act for the relief of road improvement district No. 1 of Franklin County, for confirming the assessment of benefits therein, and providing for changes therein, and providing for a referendum therein, and for other purposes", and filed in the office of the county clerk in and for the Ozark district of Franklin County, as of the 20th day of October, 1921, be and the same is hereby found and declared to be right, just, equal, and proportionate; the said re-assessment of benefits is further found to be based upon the improvement in said district as that time planned and laid out and as finally made, the said reassessment of benefits is hereby fixed, confirmed, approved, established and declared to be the assessment in and for said district and to be the benefits that has and will accrue to the property therein assessed by reason of the improvement as contemplated at the time of making and filing such re-assessment and as finally made."

That Section 3 of said Act provides:

"It is hereby, by the General Assembly, ascertained and found that said re-assessment of benefits, as filed on the 20th day of October, 1921, and as same now appears upon the assessment roll and books of said district, showing said re-assessment, and being as against and upon the railroad, track, right of way, switches, side tracks, and other real property connected therewith, and located in said District, of the Mis-

sevier Pacific Railroad Company, the sum of \$75,686.00 (Seventy-five Thousand Six Hundred and eighty-six and no one hundredth dollars); the electric lines, poles, lines, sub-stations, leaseholds, right of ways, and other interest in real property of the electric lines in said district, now held and operated by the Mississippi Valley Power Company, the sum of \$4,375.00 (four thousand three hundred seventy five and no one hundredths dollars); and as against and upon all other tracts of land, railroad, and tram roads, telegraph lines, telephone lines, electric lines, and pipe lines within said district, not herein specifically mentioned as same appears and is shown to be re-assessed upon said assessment roll and books, is in all respects fair, equitable and proportionate and to be based upon the improvement as made in said district; and same is found in each particular instance to be the benefits accruing, by reason of such improvement, to each particular tract of land, railroad, tramroad, telegraph line, telephone line, electric line and pipe line within said district; and said re-assessment of benefits is by the General Assembly hereby fixed, established and declared to be the assessments of benefits in and for said improvement district."

That section 4 thereof provides:

"That said re-assessment, hereby made and fixed as the assessment of benefits in said district, shall not be set aside or declared void by any court on account of any defeat in description of property or naming the owner thereof, irregularity in the proceedings, or any former action of any board of commissioners or assessors, and this Act shall be liberally construed so as to make the lien of said assessment valid and prior to other liens."

That said Act was passed by the Legislature and approved February 12th, 1923.

That said Act is unconstitutional and void for the following reasons:

41 A. Because no notice of intention to apply for the passage of such Special Act was published in the locality where the matter or thing to be affected was situated for thirty days or any other time prior to the introduction in the General Assembly of such bill, and no evidence of any notice having been published was exhibited in the General Assembly before such Act was passed, and the Act is unconstitu-

tional because in violation and contrary to the provisions of Section 26, Article 5 of the Constitution of the State of Arkansas, which provides that such notice shall be published at the place and for the time mentioned and evidence of its publication shall be exhibited in the General Assembly and the action and judgment of the Supreme Court of Arkansas in its various declarations which have thereby become the laws of the State, that the Legislature is sole judge whether this provision of the State Constitution has been complied with and if the Legislature shall choose to disregard such provision and pass a local or special bill without notice having been published no issue upon the subject can be raised in the courts as violative of and contrary to Section 1, Article 14 of the Fourteenth Amendment to the United States, which provides, that no state shall deprive any person of life, liberty or property without due process of law.

B. Because it violates Article 1, Section 10 of the Constitution of the United States, which provides, no state shall pass any law impairing the obligation of contracts, and also Section 17, Article 2 of the Constitution of the State of Arkansas, which provides, "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall ever be passed." That this complainant had a contract with the Commissioners of said defendant, Road Improvement District which is referred to in its amendment to bill of complaint filed herein, and under said contract it was agreed that the benefits to this complainant's property would not exceed the sum of \$250.00 per mile or a total sum of \$8,310.00. That said Act of the Legislature attempting to confirm said original assessment of benefits ignores said contract and impairs its obligation.

C. Because said Act is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall deny to any person within its jurisdiction the equal protection of the law," and which also provides that "No state shall deprive any person of life, liberty or property without due process of law." That this complainant's property would not be benefitted by the construction of improvement of said road; that said road if improved would be a detriment instead of a benefit to this complainant's property in said Road Improvement District, in that it would deprive this complainant of both freight and passenger traffic, and therefore said assessment of benefits against its property would be and is confiscatory and would deprive it of its property without due process of law.

D. Because it violates the provisions of Section 22, Article 2 of the Constitution of State of Arkansas, which provides: "The right of property is before and higher than any constitutional sanction, and private property shall not be taken, appropriated or damaged for public use without just compensation therefor." That the Assessors in revising the assessment arbitrarily and unwarrantedly increased the assessment of benefits forty per cent of the original assessment of benefits that had been made by the Board of Assessors without any regard to any possible increase in benefits that would accrue to said property.

And, also in violation of said Section One of the Fourteenth Amendment to the Constitution of the United States in that the said assessment of benefits were confirmed and the power given to said defendants to increase the same regardless of any benefits that would accrue to the property in said district.

43 Because said Act of the Legislature violates and is contrary to Sections One and Two of Article Fourteen of the Constitution of the State of Arkansas, which provides, "The powers of the Government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body or magistrate, to-wit, those which are legislative to one, those which are executive to another, and those which are judicial to another," and also provides "No person or collection of persons being of one of those departments shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

That the Legislature in passing said Act transcended its authority by attempting to find that the assessment of benefits that were made in said district "is hereby found to be fair, equitable and just as made and is hereby in all things confirmed and declared to be the benefits accruing to the property therein assessed," when the original Act provided an appeal to the courts for the purpose of determining the fairness and justness of said assessment of benefits. That said defendants and said Commissioners knew at the time that they caused said Act to be introduced and passed by the Legislature that a suit was pending in this court in which the issue was involved as to the fairness and justness of said assessment, and was an attempt to deprive this complainant of its property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

That the said assessment of benefits as originally made by the assessors, and the increase thereof, was based upon the valuation of the property of the complainant herein as shown on the collector's books of Franklin County, Arkansas, and that said valuation included personal property to the value of \$52,465.00.

44 That said Act of the Legislature attempting to confirm said assessment of benefits and attempting to grant to the assessors the powers to increase said assessment and to re-assess said property and the Act approved February 12, 1923, attempting to validate and confirm said re-assessment of property, and the original assessment as made by the Board of Assessors is demonstrably erroneous, confiscatory, discriminatory, unfair, unjust inequitable, excessive, exorbitant, palpably arbitrary, a flagrant abuse of the powers of the assessors under both of said acts for the reasons stated in the amended and substituted bill filed herein, and that complaint herein is aggrieved by the action of said Board of Assessors in making said assessment, and by the Acts of the Legislature in attempting to confirm and validate said assessments as made by said Board of Assessors in assessing said property is in violation of Section One of the Fourteenth Amendment to the Constitution of the United States hereinbefore referred to.

Wherefore, complainant prays that said Act of the Legislature approved February 12th, 1923, attempting to confirm and validate the said re-assessment of said property and the increase in the benefits assessed against said property be declared unconstitutional and void, and that the complainant herein have such other and further relief as prayed for in its amended and substituted bill herein.

VINCENT M. MILES,  
THOS. B. PRYOR,  
Solicitors for Complainant.

45

### Findings of Law and Fact.

(Filed in U. S. District Court April 19, 1923.)

The above entitled cause having heretofore been submitted upon the testimony and argument of counsel, and the court being now well and sufficiently advised, doth make the following findings of law and fact:

1. The assessment against the property of defendant includes personal as well as real property. The inclusion of personal property is unlawful.

2. The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws.

3. There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway.

4. An indirect benefit to the defendant Railroad Company by the construction of the highway is remote, doubtful and speculative.

46 5. The prayer of the bill should be granted.

A form of decree in accordance with the foregoing findings may be submitted.

FRANK A YOUMANS, Judge.

47

Decree.

(Entered in U. S. District Court April 26, 1923.)

In the United States District Court for the Western District of Arkansas, Fort Smith Division.

Missouri Pacific Railroad Company, Plaintiff,  
No. 309. vs. Equity.

Road Improvement District No. 1 of Franklin County, Arkansas, and Jerome Wilson, E. R. Prothero and Whiton Martin, Commissioners, Defendant.

The above cause came on for hearing this 27th day of February, 1923, and the plaintiff being presented by its solicitor Thomas B. Pryor, and the defendants by their solicitors, G. C. Carter, Dave Partain and Evans & Evans, the court, after hearing the evidence and argument of counsel, took the case under advisement.

Thereafter, on the 18th day of April, 1923, the Court having considered and weighed the evidence adduced, and the argument of counsel, and being fully advised in the premises finds and adjudges that the plaintiff is entitled to the relief prayed for. And the court makes the following findings of law and fact to-wit:

## I.

The assessment against the property of defendant includes personal as well as real property. The inclusion of personal property is unlawful.

## II.

The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of  
48 assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws.

## III.

There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary, there will be a loss to it in freight and passenger traffic by reason of the construction of the highway.

## IV.

An indirect benefit to the defendant Railroad Company by the construction of the highway is remote, doubtful and speculative.

## V.

That the defendants contention "that the contract between plaintiff and the Commissioners of the District fixing the benefits at \$250.00 per mile is void" should be sustained.

## VI.

That all objections to the evidence, the rulings upon which were reserved by the court at the time the same was introduced, are overruled.

## VII.

The prayer of the bill for relief as against the assessment should be granted.

It is, therefore, ordered, adjudged and decreed:

That the temporary restraining order heretofore granted in this cause be, and the same is hereby made permanent and perpetual, and the said Road Improvement District No. 1 of Franklin County, and Jerome Wilson, E. R. Prothero, and Whiton Martin, Commissioners of said District, and their successors, and those acting under them, are hereby forever enjoined and restrained from collecting or attempting to col-



lect the tax extended against the property of the Missouri Pacific Railroad Company as shown on the assessment book of said Franklin County Road Improvement District No. 1, or any part thereof, and that the assessment of benefits made by the Board of Assessors of said District, against the property of the plaintiff, Missouri Pacific Railroad Company in said District and the increase in said assessment of benefits as made by said Board of Assessors, be, and the same is hereby cancelled, set aside and held for naught. And it is further ordered that the defendants pay all costs in this cause.

To all of which the defendants at the time excepted.

FRANK A. YOUMANS, Judge.

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50 Order Allowing Time To File Approved Statement Of the Evidence.

(Entered in U. S. District Court May 2, 1923.)

This May 2, 1923, on application of the defendants, by J. H. Evans, their solicitor, it is ordered by the court that defendants be and are hereby allowed ninety days from this date, within which to prepare and file a statement of the evidence as provided for by Equity Rule 75.

FRANK A. YOUMANS, Judge.

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51 Order Extending Time to File Approved Statement of the Evidence.

(Entered in U. S. District Court July 31, 1923.)

This day, on application of the defendant by Dave Partain, its solicitor, and for good cause shown, it is ordered that the time within which the defendant may file an approved statement of the evidence for the purpose of appeal in this cause be and is hereby extended to September 15, 1923.

FRANK A. YOUMANS, Judge.

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52 Approved Statement of the Evidence.

(Filed in U. S. District Court August 30, 1923.)

Be it remembered that on this 27th day of February, A. D. 1923, before the Honorable Frank A. Youmans, Judge, presiding, the above entitled cause came on for hearing, the

plaintiff being represented by Thomas B. Pryor, and the defendant by Dave Partain, G. C. Carter and Evans & Evans.

R. E. WARDEN, a witness sworn on behalf of the plaintiff, testified as follows:

### Direct Examination

By Mr. Pryor:

Q. You may state your name, residence and occupation.

A. R. E. Warden, Little Rock, Arkansas, Assistant Engineer, Public Improvements, Missouri Pacific Railroad Co. with office headquarters Little Rock, Arkansas.

Q. How long have you been connected with the Engineering Department of the Missouri Pacific.

A. About 17 years.

Q. In what line of work in connection with that department have you been engaged for the last several years?

A. For the past seven years I have been in charge of public improvement matters affecting the Missouri Pacific Railroad property in the States of Arkansas, Oklahoma and Louisiana.

Q. What have you done in that connection, Mr. Warden, with reference to investigations?

A. We meet various members of Commisisoners in Improvement Districts and discuss with them probable benefits to railroad property.

Q. Mr. Warden, are you familiar with the Road Highway to be improved under the provisions of the act creating the Franklin County Road Improvement District No. 1?

A. Yes sir.

Q. Have you been over that road? A. Yes sir.

Q. Does that road parallel the line of the Missouri Pacific Railroad? A. Yes sir.

Q. From what point to what point?

A. Throughout the county.

Q. Throughout what county? A. Franklin County.

Q. Have you a map or a blue print made of the road?

A. Yes sir.

Q. I hand you blue print Mr. Warden. Does that accurately show the situation with reference to the railroad, the proposed public highway and the boundary lines of the district? A. Yes sir.

Q. What does the red line indicate?

A. The line of railroad.

Q. What does the yellow line indicate?

A. The line of the highway.

Q. What does the green line indicate?

A. The boundaries of the district.

54 Mr. Pryor: I desire to offer this blue print in evidence.

The Court: It will be received. (Identified as Exhibit A).

Q. Mr. Warden, does this Franklin County Road Improvement District connect up with any other road improvement district?

A. It connects up in Johnson County with the Johnson County Road Improvement District, and will connect with the proposed Road Improvement District for Crawford County at the Franklin and Crawford County line.

Q. Does the Johnson County line connect with any other line?

A. The Johnson County line connects—you mean the Johnson County road?

Q. Yes.

A. On the east with the Pope County Road Improvement District.

Q. And does the Pope County line connect with any other road?

A. Yes sir, the Pope County Road connects with Conway County.

Q. A road through Conway County? A. Yes.

Q. Is there any improved highway through Faulkner County?

A. Yes sir, it is completed through Faulkner County down to the Pulaski County line.

Q. Well, have they a hard surface road through Pulaski County?

A. Yes, sir, that is under construction now by Pulaski Road Improvement District No. 10.

The Court: Is that north of the Arkansas River? What I wanted to get at was whether it made connections at Little Rock?

A. Yes sir, it makes connections at Little Rock north of the river.

Q. Then they have a free bridge there at Little Rock across the river.

A. Yes sir, and soon will have two of them.

Q. Mr. Warden, do you know how much of these improved highways have been completed between Fort Smith and Little Rock?

55 A. Yes sir. I have checked this matter up with the records in the Arkansas State Highway office and am advised by that department that about 45 per cent—

Judge Evans: We object, if Your Honor please, it shows on its face it is hearsay evidence.

Q. You got it from the public records of the State Highway department?

A. State highway department.

The Court: Well, there is a way to prove the public records, Mr. Pryor.

Judge Evans: The record might be one thing and the physical facts might be another.

The Court: I believe the records would be competent to show what was contemplated.

Judge Evans: Now counsel is asking him the question if he knows what portion has been completed. And he undertakes to show a certain per cent according to these records has been completed. We maintain that is hearsay.

Q. Mr. Warden, have you made any personal investigation? Do you know from your own personal knowledge whether any portion of Faulkner County or Pope County road has been completed? A. Yes sir.

Q. How much of it?

A. I have been over the roads of the four counties.

The Court: Well, that part of it is all right.

Q. Now how much of the road you stated that you have been over, in your opinion, has been completed?

A. About 45 per cent of the total distance between the cities of Fort Smith and Little Rock have been hard surfaced in the past three years. 38 per cent is now under construction and 17 per cent proposed.

Q. Does that include the road in Crawford mentioned?

A. Yes, sir.

56 Judge Evans: I think probably the witness is not answering the question counsel asked him. Counsel asked him definitely what part of the road he had examined had been completed. Now then the witness proceeds to make a general statement in regard to it, as it appears he was about to do when he said he had checked up with the records of the Highway Department.

The Court: I understood the witness was informed. That what was told him by the officers of the State Highway Department would be hearsay and therefore not competent. And that should be eliminated, but what he knew of his own personal knowledge,—now do I understand, Mr. Warden, that is what you are testifying about?

A. Yes sir. Now one purpose of the checking up with the Highway Department—

The Court: That doesn't make any difference. The point is what are you testifying with reference to. Your own personal knowledge as to what has been constructed of this particular highway?

A. As a total proposition between the two cities, yes sir.

Q. Mr. Warden, you have had charge of the improvement districts in connection, I believe you stated you have had charge of the investigation of the improvement districts in connection with your position, with the Engineering department of the Missouri Pacific Railroad? A. Yes sir.

Q. Now how does that road, that portion of which has been constructed say through Johnson County, Pope or Conway, compare with the road that has been constructed through Franklin, this road in controversy?

A. The road in Franklin County is constructed of gravel surface and in Johnson County of gravel and some broken stone, macadam and in Pope County some gravel and  
57 broken stone treated with oil, and in Conway County they have asphalt surface of some kind, and in Pulaski County it is planned to have concrete base and the asphalt surface.

Q. Well, are those more expensive roads than the road constructed in Franklin County.

A. The concrete base, asphalt surface is more expensive than a gravel road.

Q. How does the cost of the road in Johnson and Pope County compare with the Franklin County road?

A. I can't give you a comparison of those roads because I am not familiar, except I will say this: I do not believe the cost of the road in Franklin County is any more than the cost of the road in Conway County.

Q. Now do you know what the assessment against the property, does the road in Conway parallel the line of the Missouri Pacific in Conway County? A. Yes sir.

Judge Evans: We object, if your Honor please. We do not think that makes any difference what was done in Conway or any other county.

The Court: What is the object of that?

Mr. Pryor: The object of that is to show that the conditions being the same, the great discrepancy, showing how the assessment is made. We are assessed in this district \$2300. a mile and we want to show that under similar conditions by the same process arrived at by Assessors in considering any possible benefits accrued to the railroad company in Pope County we are assessed \$125.00 a mile; in Conway county we were assessed \$125.00 a mile; in Conway County we were assessed \$85.00 a mile. Now that evidence is a matter of record and appears in the Federal reports. Judge Sanborn refers to that fact in discussing an act of the legislature in the case of Road Improvement District No. 2 vs. Missouri Pacific Railroad Co., 275 Federal, 604.

58 The Court: What county was that in?

Mr. Pryor: That was in Conway County, where we were assessed \$125.00 a mile. That was finally increased by a legislative enactment to \$250.00 a mile because a tentative assessment had been made against the Missouri Pacific of \$2500.00, in consideration of having some spur tracks made for the Road District, it was finally reduced to \$125.00 a mile, and the Legislature adhered to that in that case, what they have done in this case; they passed an act confirming an assessment against the Missouri Pacific. An action was brought to enjoin that in Judge Trieber's court. The Road District appealed to the Circuit Court of Appeals. I think it is competent to show here we are assessed in Johnson County \$125 a mile, in Crawford County we were assessed \$175.00 a mile, but never before has an assessment of this character been attempted to be levied. We have the combined knowledge and opinions of all the commissioners of these various districts. I think it would throw light on the question of reasonableness.

Judge Evans: Your Honor will see that we have no opportunity to inquire of the commissioners of these other counties how the property, all the other real property in those districts, how that was assessed.

The Court: To have real effective weight it is true that the court should know the conditions in these other counties, at the same time can take judicial knowledge of the fact that, say from Morrilton down to Little Rock the character of the soil would perhaps be different to the character of the soil between Fort Smith and Morrilton, not so much stone perhaps, more of a bottom land. The testimony will be allowed

to go into the record and the ruling will be reserved until all the testimony is in. I don't know just what situation we will find ourselves. It is all before the court, and if at the conclusion it is found to be not applicable, or not relevant it can be disregarded and excluded.

59 Q. The question was what was the amount of assessment of benefits against the property of the Missouri Pacific, its line of railroad by the highways paralleling it in Johnson County, Franklin County, Conway County and Faulkner County, and if there was ever an assessment made in Crawford County you may state that.

A. I am not sure that I can recall all counties.

Judge Evans: I would call attention to another thing that is a matter of personal knowledge, and that is a matter of record. If he has no personal knowledge of the assessment he can't prove it that way.

Mr. Pryor: He has the personal knowledge as far as the assessments are concerned.

The Court: How does he have it?

Q. Have you represented the Missouri Pacific Railroad Company in the matter of fixing the benefit of assessments against this property in these road districts?

A. Yes sir.

Q. Have you conferred with the Board of Commissioners and with the assessors, and did you, for instance, in Johnson County, reach an agreement with the Commissioners and Assessors as to what the assessment should be in Johnson County? A. Yes sir.

Q. What was it in Johnson County per mile?

A. \$85.84 per mile.

Q. What was it in Pope County? Did you there confer?

A. Yes sir.

A. What was it? A. \$125.00 per mile.

Q. What was it in Conway County?

A. \$125.00 per mile.

Q. What was it in Faulkner County?

A. That I don't recall.

Q. I will ask you if that wasn't fixed by legislative determination in advance?

60 A. I think it was.

Q. Was there a district organized to build the road from Van Buren to Mulberry in Crawford County to connect with the Crawford County line?

A. Yes sir.



Q. What was the assessment of benefits in that district agreed upon between yourself and the commissioners?

A. \$175.00 per mile.

Q. Now there was a district of west Crawford, Road Improvement District that went on out into Oklahoma?

A. Yes sir.

Q. Do you know what the assessment was in that district, the road across the mountains in Crawford County?

A. As I recall, that was \$350.00 per mile.

Q. Mr. Warden, in your investigations and conferences with the various commissioners and assessors of the different Road Improvement Districts in Arkansas, have you prepared a statement as to the average amount that was paid in Road Improvement District by the Missouri Pacific in the state of Arkansas?

A. Yes sir.

Judge Evans: We object to that, if Your Honor please, for the same reason as stated before.

The Court: That statement that you have, was that based upon your information and knowledge derived from your conference with the Commissioners of the districts and assessors of the various district in reaching an agreement as to what the benefits should be against the Missouri Pacific Railroad?

A. Yes sir.

The Court: Very well; it may go in subject to the ruling as to its admissibility at the close of the hearing.

Q. I wish you would state how many districts that includes and what was the average per mile assessed in those districts in Arkansas?

G: The Court: Don't you want to introduce that as an exhibit?

A. I have some other information on this same sheet.

The Court: I think if it is to be of service to the court and is admissible at all, it would be very desirable to have it in the form of an exhibit so the court can study it.

Mr. Pryor: Just make one. It would be better that way.

The Court: Of course, these exhibits are not conclusive how they are constructed, if it lead up to definite results and it is testimony tending to sustain the theory of one side or the other, and if the testimony is competent at all it ought to be in that form, I think.

Q. I will ask you, Mr. Warden, to make a statement in writing to be handed to the reporter.

The Court: You may call him later when he has prepared it.

Judge Evans: He might make a statement and give us a copy of it.

Mr. Pryor: I have no objection.

Q. Now, Mr. Warden, I wish you would state in your own way to the court the investigation that you have made, if any, with reference to this particular district as to the assessment against the property of the Missouri Pacific, how it corresponds with the assessment made as against other property on an area basis, and give the court the benefit of the knowledge you have with reference to the assessment, and the assessment against other property?

A. I have been over the road in question, I have examined the assessment book and taking their sub totals and arrived at these figures that I have in front of me. The district as a whole embraces 67,000 acres approximately.

The Court: Now that is this district in Franklin County?

A. Yes sir. That includes the towns or area that would be occupied by the towns in the district, benefits assessed for all property embraced according to the sub totals, on the board of assessors' book, which has been filed with the Franklin County Court, totals five hundred—

Judge Evans: That would be best to be shown by the records.

The Court: If the record is here and open to inspection he may testify.

Judge Evans: We have no objection if he reads from the record.

The Court: Very well.

A. Total \$575,421.35. Of this amount \$75,686 is assessed against 32.59 miles of Missouri Pacific Railroad right of way comprising 565 acres of land. I wish to qualify that mileage and acreage is determined from our own right of way records. Your assessors book does not deal in tenths of miles. I have gone into and determined it as near as I can.

Q. What was the figure you stated with reference to right of way in this district?

A. 565 acres. This assessment of benefits averages \$2, 322.36 per mile of main line right of way, or an average rate of about \$134.00 per acre of right of way.

The Court: Now while you are on that point, referring to Exhibit A, what portions of your line did you call main line? You have there a line from the western boundary of the county, running as far as a point east of Ozark a few miles, and there you have two lines. Are both of those red lines at the place of junction come there to the eastern portion of the county, are they called main line?

A. In my statement I have classed this as main track.

The Court: Then all of the line that you have indicated in Exhibit A you have called main line?

A. Main track right of way and I have a little table form there that shows the mileage of the Altus Branch, Coal  
63 Hill Branch and the main line proper right under the matter. The railroad right of way acreage consists of 565 acres, and assessed total benefit of \$75,686.00, is about eight-tenths of one per cent of the total area in the district and is assessed about 13.2 per cent of the total benefits fixed for the entire district. If the same area assessment levied for all property in the district adjacent to railroad property including towns, had been applied to the railroad right of way the benefits would have totaled for the railroad property embraced in the district about \$6,917.00 or 1.2 per cent of the total benefits in the district, or on an average of \$212.26 per mile of right of way for the 32.59 miles. This would be an average of \$12.24 per acre of right of way.

The Court: Now, at that point, you have used the word adjacent in your answer. Now do you mean by that to include all of the land in the district?

A. Yes, sir, and I should have said adjacent to and all lands.

The Court: All right; go ahead.

Q. Do you know how much of this road has been completed?

A. My last trip over the road was in the last week in November, 1922. It was practically all completed at that time, almost one hundred per cent. They were still applying some gravel but I think they had some work yet to be done. It was pretty close to completion.

Q. Have you in connection with your position with the engineering department in charge of improvement districts in

Arkansas, made any investigation for the purpose of determining the result of an improved highway paralleling a railroad company, what effect it has upon the railroad?

A. Yes sir.

Q. You may state to the court what has been your observation and result of your investigations along that line?

Judge Evans: We object, your Honor.

64 The Court: It is true it is hearsay, but in certain matters an individual is allowed to take matters of hearsay. One instance is with reference to the value of property. The witness undertakes to give his opinion of the value of the property. It must be based upon his observation, what he knows of sales that were made, and offers. Now in this character of case the question is what effect does the construction of the road have upon the tonnage that a road obtains. That is what it is constructed for, to carry freight and passengers. Now the only way that information can be obtained upon that proposition is by observation, by a certain character of inquiry, and the weight to be given to the opinion or reply of any witness must depend upon the degree of accuracy which may be credited to the particular investigation that he made. If he is shown to have made only a desultory investigation, then of course it is of no service to the court. If, however, he has gone into matters which indicate that he has made an accurate survey of the situation and has given the court all facts, why then it may be of benefit to the court. He may answer and the ruling upon the objection will be reserved.

A. I know that parallel highways to railroad property is a detriment.

The Court: The point that was asked you was not whether it was a detriment or a benefit. That is a conclusion. The question asked you was what is the effect of the parallel highway, a hard surfaced road so capable of bearing traffic of different kinds, such as is transported over such a highway, what effect does that have on the road. Now that effect must be indicated by some physical fact. It either takes traffic away from a railroad or it does not. Now that is the point you were asked, not whether it was a benefit or a detriment. What is the effect, say in a physical way?

Q. You may state, Mr. Warden, if you have been in a position to make observations with reference to the effect that these improved highways have upon freight and passenger traffic of a railroad?

A. Yes sir.

Q. State what it has been?

A. It takes business away from the railroad.

Q. How does it take it away?

A. The hard surfaced road develops competition through the use of motordriven vehicles, such as motor trucks for hauling freight, automobiles transporting passengers.

Q. Have you any particular instance in mind where the railroad has suffered a loss of revenue on that account?

A. Yes sir.

Q. What road is that? Is it in Arkansas?

A. Yes sir.

Q. Between what points?

A. I will state three different localities. There is a hard surfaced road between the cities of Little Rock and Pine Bluff for instance. There are scheduled automobile cars between the two cities carrying passengers. I don't only know this from observation from trains that these cars are filled, but I have made the trip on several occasions myself in automobiles. They don't only transport passengers over this line of highway but motor trucks will haul freight. They are hauling freight out of Little Rock to a point maybe midway between the two cities and there will be another distributing point, hauling groceries, soft drinks and such other commodities as can be transported by trucks out of Pine Bluff north.

Q. What is the distance between Pine Bluff and Little Rock?

A. As I recall about 45 miles by highway.

Q. Did you have charge of a count that was kept there of the number of passengers using those jitneys between Pine Bluff and Little Rock?

A. Yes sir.

Q. Have you got the figures with you on that?

66 A. No, I don't believe I have.

Q. Well, what other points did you suggest?

A. Taken over in Crittenden County, Arkansas, there is automobile passenger cars running there from Memphis through Crittenden County touching the points of Arley, Broken, Marion. They run on schedule time.

Q. In competition with the train?

A. In competition with the railroads and in practically all cases their freight between various points is a few cents less than railroads. That doesn't occur between Little Rock and

Pine Bluff, but it is more the convenience there, the people take advantage of. This development in Crittenden County that I speak of, they have schedules posted at the various towns and you can make a trip between we will say Broken and Memphis at least every two hours. They have a regular station in Memphis where people go wait for the cars to come in and make these trips.

Q. Is that also true with reference to the freight traffic over there?

A. Yes sir. L. C. L. trucks hauling cotton across the bridge to Memphis whereas it used to be transported by the railroads. Another particular point that I have in mind and a road over which I have traveled, there are now scheduled passenger cars between Little Rock and Conway. I believe they make three round trips a day. I made that trip I think in November.

Q. Between Little Rock and Conway?

A. Yes sir; notwithstanding the fact that the new road in Pulaski County is not yet completed, or not in use, but the good road starts at the Pulaski-Faulkner County line. Of course, you have a very good paved highway from there into the town of Conway.

Q. Have you observed any hauling of trucks between the two points, those particular points? A. No, sir.

67 Q. But you have observed them in Crittenden County?

A. Yes sir.

Q. And also between Little Rock and Pine Bluff?

A. Yes sir, and I have observed the same thing on the Arkansas and Louisiana highway in the southern and eastern part of the State where there is a highway of concrete base and asphalt top over the major portion of this line of road.

#### Cross-Examination

By Mr. Partain:

Q. Mr. Warden, speaking of the completed highway between Little Rock and Fort Smith and Van Buren and the amount of the road that had been completed, giving I believe you said, 45 per cent. How much of that highway have you actually been over and inspected between Van Buren and Little Rock?

A. Well, I have been over the whole distance.

Q. Can you tell the court between the Johnson County line and the town of Russellville how much of it has been completed?

A. No sir. I can give you the distance between the two cities by way of highway approximately, as compared to the distance on the railroad.

Q. Can you give the distance between the cities of Little Rock and Van Buren or Fort Smith?

A. Fort Smith and Little Rock by way of highway?

Q. Yes, sir. A. About 175 miles.

Q. And how much of that completed highway that you spoke of is in Franklin County in this road district?

A. 23.9 miles.

Q. As a matter of fact, Mr. Warden, there is no improved highway in Crawford County between the Franklin County line and Van Buren, Arkansas?

A. That is the portion that I have here as present proposed.

Q. As a matter of fact, Mr. Warden, your investigation that you have spoken of, and your knowledge, don't you know that the road district created there finally went up in the court and the district repealed by act of legislature, and there is no district proposed in that county at all?

A. I would hardly go into that county but what we hear of some men that have to promote that road—

Q. I just asked you if it isn't a fact that the affairs of the district went up in the court and that district abandoned?

A. But then I say "proposed". It is being promoted right now.

The Court: As I understood you, Mr. Warden, when you said proposed you had in view an act of the legislature. Now whether that was carried out or not, is another matter. Do you know whether a road district was ever created from Franklin County line to Van Buren by the legislature?

A. I think so.

Judge Evans: I understand that it was passed and repealed.

Mr. Pryor: You also understand that there is another act pending before this legislature.

The Court: Whatever that may be, I understood the witness testimony when he used the word "proposed" to have reference to acts that have been passed.

Mr. Pryor: The act is still in existence, though the road has not been built.

Judge Evans: It is my understanding it is.

Mr. Pryor: As far as I know when this suit was filed that act of the legislature was still in force and effect.

Mr. Partain: The suit you talk about was the suit where they abandoned it and paid the expenses of the district?

Mr. Pryor: Yes, sir.

The Court: If you agree on it, it is not worth while to take up time about this. As I understood it, Mr. Warden's testimony was based upon some proposed plan and the word proposed was used with reference to some act of the legislature. Now whether it has been abandoned or whether it has been repealed or not is another proposition.

Q. In reference to the Johnson County project, Mr. Warden, do you know whether that was by legislative act or under the Alexander law?

A. I don't recall Mr. Partain, whether that was a special act or the Alexander good road law.

Q. As a matter of fact it has been abandoned, hasn't it?

A. I don't think so. The part that parallels the railroad.

Q. Don't you know that when some eight or ten miles of the road was completed two or three years ago, and that there has been no construction of any kind on it for the last two years?

A. Well, most of it parallel to the railroad has been hard surfaced. There is some parts of the new system that has never been completed.

Q. Well, from the Johnson-Franklin County line down to the town of Clarksville parallels the railroad, does that not parallel the railroad? A. Well, I think so.

Q. It is continuous on down now, you say you have been over the road. Do you know the approximate distance from the Johnson-Franklin County line to the town of Clarksville?

A. I can't give you any of those intervening distances.

Q. I will ask you if it isn't a fact that that part of the road is not hard-surfaced and it parallels the railroad?

A. It has a gravel top; it may not be completed.

Q. From the Johnson-Franklin County line?

A. I think so.

Q. The part of the Johnson county that was constructed from Clarksville, did you say what kind of road that was?

A. That is either a broken stone macadam or a gravel top.

Q. There was no stone base to that road was there Mr. Warren?

A. I don't think so. I think that is water-bound macadam.

Q. Now you gave the figures awhile ago to the court as to the different assessments agreed upon in the road districts in Johnson, Crawford, Conway and Faulkner and other counties.



I don't believe you gave the average, but I will ask you Mr. Warden, if the Missouri Pacific is not paying a considerable larger assessment than that in some other road districts in the state? A. That is, not considerably so, but more.

Q. I will ask you Mr. Warden, if these agreements that you speak of, with the various commissioners and assessors that you have testified about, they were made were they not, shortly after the 1919 session of the Arkansas Legislature, after all these acts were created by that legislature during the year 1919?

A. I think 1919 and 1920, yes, sir, those acts were passed.

Q. Is it not a fact that they were made with the commissioners and assessors prior to the time that the question of benefits of railroad property had been determined by the Supreme Court of the United States?

A. I don't know what you have reference to.

Q. I have reference to the Bush-Branson case that was passed on by the United States Supreme Court prior to 1919. By the Supreme Court of the United States?

A. I think so.

Q. Now speaking of the lines of cars in Crittenden County, Pulaski County and Conway County, leaving Conway County you state that they run on a schedule there?

A. When they haven't a muddy road; same thing in Faulkner County that they run on.

Q. That is just a dirt road from the Conway county line?

A. No, from Conway to the Pulaski County line is the improved and from the line into pretty close to Little

71 Rock you have the old road which is to be improved.

And by the way, I can give you the assessment of benefits to the Missouri Pacific on that road. That was one of the most recent assessments fixed for railroad property and all other property in the state around it. \$300.00 per mile, that is the railroad in North Little Rock was assessed \$300.00 per mile, and out of the town in the country \$150.00 per mile.

Q. Mr. Warden, as far as you know there is no bus line or truck line being operated in Franklin County along this road?

A. Not as I know of, other than service cars on these roads because I employed one in November and I made two trips over this Franklin County road.

The Court: For passengers?

A. I don't know of any regular passenger cars but I employed this one to make this trip.

Q. They run service cars over that road prior to being hard surfaced? A. I don't know about that?

Q. Didn't you go on into Crawford County in that car?

A. No, we went to the end of this district and turned and went back.

Q. You spoke about road District No. 10 in Pulaski County. How many road improvement districts in Pulaski County is the Missouri Pacific assessed in?

A. Pulaski County road district No. 10, Little Rock-Hot Springs highway.

Q. Can you give the assessment as against the property in that district, Little Rock-Hot Springs Highway?

A. \$137.00 per mile.

The Court: What about Pulaski No. 10?

A. \$300.00 a mile for all main line in cities and near Little Rock \$150.00 per mile for all main line located outside of the two cities.

72 Q. What other districts?

A. The Little Rock-Hot Springs \$137.00 per mile. An average throughout Pulaski, Saline and Garland Counties, Arkansas, and Missouri Highway improvement District, Pulaski County, the assessment against the railroad property in that district is \$250.00 per mile. Little Rock Spring Lake Highway Improvement District, I don't recall what that assessment is, but I will say that it is not out of line with these others. And the North Little Rock and Galloway Highway Improvement District in Pulaski County, I don't recall the figures on this either, on those last two named.

Q. Are there any other districts in Pulaski County that the Missouri Pacific property is located in?

A. Yes, sir; Pulaski County Road Improvement District No. 9.

Q. There are others. Do you recall the assessment of any others?

A. In this one that I have in mind was \$100.00 per mile, Pulaski County Road Improvement District No. 9. That is between Little Rock and Pine Bluff, a connecting link.

Q. Are there others?

A. There must be some old districts that I am not familiar with.

Q. Can you give the date when the agreement that you speak of was entered into with the commissioners and assessors of Crawford County Road Improvement District? Can you give the year? A. No sir.

Q. Can you give the date that the agreement that you speak of was entered into in connection with Johnson County? A. No sir, the records will reflect that.

Q. Can you do that in any of the districts that you have named? A. No sir.

73 By Judge Evans:

Q. You were asked when you had the arrangement with the various Commissioners and assessors about the assessment of railroad property in the counties of Johnson, Pope, Conway and Faulkner about which you testified. What was your answer in that regard?

A. That I couldn't give the dates.

Q. Was it in the year 1919?

A. Really I can't give you definitely. I think it was in 1919 or 1920.

Q. Did you make those agreements yourself?

A. Yes sir.

Q. Did counsel, Mr. Pryor, who represented the railroad company there, did he have anything to do with the arrangement of these prices? That is, the assessments that you speak of? A. He approved them.

Q. Did you make the agreement first?

A. He and one of his assistants. One of his assistants and myself met the Board of Commissioners in some cases, and in other cases the Board of Assessors, and I believe possibly in joint session of the two boards, and they agreed on a figure and that was submitted to Mr. Pryor and the management in St. Louis for approval.

Q. Now had assessments been made in those cases by the regular assessing officers of the District prior to the time you appeared before them and you made these agreements that you speak of?

A. Yes sir, they had practically completed their assessment.

Q. And they had made assessments for amounts larger than the amounts that you finally agreed on? Is that right?

A. They had the assessment fixed for practically all property in the district and the railroad benefit assessment was left open at our request, which was to be discussed at this conference at which time it was decided upon the amounts fixed for railroad property.

74 Q. These various assessing boards did not make any assessments of benefits that would accrue to the railroad for the building of the highway in a particular instance, and left that open and that was a matter of arrangement and

agreement between the railroad company's officers and the boards?

A. Their mind was open. My statement is this: Their minds were open at the time that we met with these boards in conference and at that time it was agreed between myself and probably a legal representative on so much per mile, which was satisfactory to the assessing board and commissioners. And then we recommended to the railroad management certain amounts which was in these cases \$125.00 a mile in two counties and \$84.84 or something like that in Johnson County.

Q. Then these amounts that you testified to as having been made for the assessment of benefits, were assessments of benefits that you and others representing the railroad company proposed to the various assessing boards and they had made none of their independent motion?

A. No; we discussed the thing pro and con freely, I didn't have anything in mind, and neither did counsel for the railroads. We didn't have anything in mind at the time we went. Then we took up the assessment on other property in the district and it was finally agreed that a certain amount would be proper for the railroad company to pay.

Q. Then if I get you, the assessing boards or assessing authorities or officers of those various districts had not made assessments to the railroad?

A. They had not actually recorded it on the assessment book for the railroad property.

Q. The question was left open to your request?

A. No, they did not leave it open at our request.

Q. Didn't you state a moment ago that it was left open at your request?

75 A. No; they met in this conference at our request.

Q. Well, the matter was left open whether at your request or not?

A. They had not actually put the figures on the assessment book.

Q. It was a matter of agreement and not a matter of assessment prior to that time between yourself and the District?

A. If you are asking that as a question, did they make their assessment before this conference, I will say no.

Q. And then at this conference, then these various amounts that you speak of were agreed on, and then you recommended that to the railroad? A. That is correct.

Q. Now were those agreements made prior to this agreement which is stated in the pleading in the case as having

been made, or attempted to be made between the commissioners of Road Improvement District and the Railroad Company through its attorneys?

A. You mean this written proposal?

Q. Yes sir.

A. That record will reflect that. I don't know what time.

Q. Was those agreements that you speak of made prior to that time? A. What is that date?

Q. 22nd of November, 1919? and Mr. Pryor's letter of acceptance of the 28th? A. I don't recall exactly.

Q. What is your best recollection?

A. I should say that maybe one of them had been. I don't know for sure. I am not going to [give] you any definite date because I don't recall. I am not going to give you any dates.

Q. I just asked you to state whether you knew?

A. I don't remember that.

76 Q. Now Mr. Warden, do you know when the decision you were asked about, the decision in the Bush-Branson case, do you know when that was rendered?

A. In the United States Supreme Court?

Q. Yes sir.

A. I looked it up. December 22, 1919.

Q. Now then the decision of the Circuit Court of Appeals for the 8th Circuit had been rendered some considerable time prior to that time? A. Evidently so.

Q. Now these proceedings with these various districts that you speak of were had during the time that the Circuit Court of Appeals decision was in force in this circuit?

A. I don't know.

Q. Now Mr. Warden, do you know what the assessed value of the property in this road improvement district is, the entire assessment of real property?

A. Of the Missouri Pacific Railroad Company?

Q. No; of the entire property assessed for the purpose of general taxation in the district?

A. I think I have that total from your assessment book, which is in front of you there.

Q. That is what I want to get at.

A. \$1,754,000.00.

Q. What was the assessment of the railroad property in the district? A. I understand that is the total.

Q. Isn't that the total of the other property outside of the railroad and the railroad \$711,325.00?

A. I understand that figure of \$711,325.00 is included in that Judge—

Q. On that basis, then what per cent of the taxes in the District for ordinary county and state taxes and so on does the railroad pay, the basis that you are speaking of now? That is what per cent of \$411,225,000?

A. I don't know that I can tell you what they paid in Franklin County for last year.

Q. I don't care for that. Don't you know that they will amount to more than 30 per cent or 40 per cent if your figures are correct? A. I have not figured it.

Q. If you divide it, it will give you the percentage?

A. That won't give you the proportion of taxes paid. I can give you a correct figure on that.

Q. I am asking you for percentage, if you can give it? That is not taxes; that is tax real valuation. You don't have any recollection about taxes paid in the county, but if you paid in proportion, then this will give you the per cent of the taxes actually paid?

A. I would not attempt to give you the per cent of taxes paid unless I knew what the total was.

Q. Will you tell me what percentage of the entire value of the taxable property in this district belongs to the railroad company?

The Court: Let me see if I understand, Judge Evans. How can the percentage of valuation in the district be used as a measure of the percentage in the entire county?

Judge Evans: I am asking about the county. I am asking the property in this district. If I said county I meant this district.

Mr. Pryor: We desire to object, Your Honor, as to what the percentage is confined to the district?

The Court: Oh well, if he can figure out the percentage all right, and then the matter of its application is a matter of argument or conclusion. Certain percentages with reference to the matters involved were submitted by this witness. The percentage can readily be obtained, according to the question of Judge Evans, to divide the assessment for improvement purposes in the district against the railroad, by the amount of assessments in the entire district.

Judge Evans: The question that I have now immediately, I want to show by this witness that the valuation of the railroad property, and the other property in this district, that the proportion of the railroad's property in the district for

general county and state purposes, is very much larger, that is, it is in the relation of \$711,325.00 to \$1,754,000.00.

The Court: Well, you ascertained it in the way I stated. Whether that will reach what you want is a different proposition.

Judge Evans: That is exactly what I am asking him to state. What percentage of the property the railroad property is of the entire property in the district.

A. I will answer that in this way: That if the total valuation of all property in the district is \$1,754,000.00, in round numbers as shown on the district's assessment book, represent the total value of all property in the district and includes the \$711,325.00 as the value shown [for] the Missouri Pacific Railroad on your assessment book, then that railroad value is about 41.7 per cent of the \$1,754,000.00.

Q. It is practically 42 per cent of the entire taxable property?

A. That value as shown for railroad property is closer to 42 per cent than it would be 41 per cent.

Q. Now have you a statement of the assessment of benefits the assessments of benefits for the entire district?

A. Yes sir. First, I have totaled it for the sub total shown on the assessment book.

Q. You gave that I believe, in your direct testimony.

Q. You gave that I believe, in your direct testimony.

79 A. I think I did. We differ just a little bit, probably \$500 because I took the sub totals of all this shown on the assessment book. It does not show quite the exact amount as shown in the sums in the back part of the book, but it is pretty close. My total shows \$575,421.35 as the total benefits assessed in the district.

Q. Does that include the railroad property?

A. The benefits assessed for all property embraced according to sub totals on the Board of Assessors' book now with the Prudden Court Court totals \$575,421.35. That would include all this.

Q. Now have you made the percentage now? What is the percentage of the assessed benefits of the railroad property in the district? What is the assessed benefits to the railroad property in the district? \$75,086.00?

A. The railroad company's assessed benefits total \$75,086.00. That is 13.2 per cent of the total benefits assessed. Does that answer your question?

Q. Yes sir. Now then if the \$75,086.00 of assessed benefits against the railroad company is not included in this \$575,

421.00 it would have to be added to it making a larger amount? A. But I think it is included.

Q. Well, you don't know. That is a question of fact that can be determined, if it is not included. Will you please add the two together and tell me what per cent of the entire assessed benefits goes to the railroad company on that theory?

A. If the \$75,686.00 which represents the total assessment against the Missouri Pacific property is not included in the \$55,421.00 as the total benefits fixed for property in the district, and we add to this latter figure the Missouri Pacific assessment of \$75,686.00, we will get a total of \$650,107.00. Now the assessment fixed for Missouri Pacific property, \$75,686.00 would be about 11½ per cent of that \$650,107.00, as I calculate it.

80 Q. Now then Mr. Warden, in those districts you spoke of where the assessment was agreed to between the representatives of the railroad and the assessing officers of the district at the sums you have indicated, did you assess—were the assessments made on the valuation basis, or on the average basis of the property?

A. You mean all property as a whole?

Q. Yes. For instance, Johnson County, were the assessments of benefits in that county put on an acreage basis, or on a valuation basis? I understood you to give it by the acre. I might be mistaken.

A. Johnson County Road Improvement District No. 1 assessed the Missouri Pacific at an average rate of \$4.74 per mile. They divided the district into zones. In zone one the land was assessed at \$0.00 per acre; zone 2 at \$8.00 per acre; zone 3 \$6.00 per acre; zone 4 \$2.00 an acre. I have that as a record here.

Q. Now then what was that per acre for the railroad. Did you assess that by the acre, or how was it assessed?

A. There was a total assessment of benefits of \$4,000.00 for Johnson County.

Q. Did you figure how many acres there was in that?

A. No.

Q. But you reached that agreement, as I understood you a while ago, in consideration of the assessment of the acreage of the other property? Is that right?

A. Well, I don't recall this particular district. I know other assessments were considered at the time.

Q. Do you know how many acres there are in the right of way in Johnson County?



A. I can't give it to you because I haven't it here. I can determine it from the right of way records in Johnson  
81 County and give it later.

Q. Isn't it approximately a hundred acres in Johnson County in right of way?

A. I don't know; I can give you the miles of railroad that that represents.

Q. How many miles of railroad? A. 42.2.

Q. Does that include spur tracks and everything?

A. That is the main track right of way, what is considered main track.

Q. Now take, we will say the basis for assessment of benefits of the railroad. What basis was taken for the assessment of benefits? What assessment was used?

A. You understand I didn't make the assessment. They considered the \$4,000.00 for total benefits was fair and equitable and we accepted it.

The Court: That is in the Johnson County district?

A. Yes sir.

Q. That was upon discussion, but you don't know what basis was adopted for the assessment?

A. Yes sir, they made that assessment themselves.

Q. But you don't know what basis they adopted, you don't know what they used? As far as you know they did not adopt the mileage basis?

A. They informed us that they made their assessment on the benefit basis.

Q. But in order to arrive at the benefits you don't know whether they took any basis?

A. No, I couldn't give you their ideas on that.

Q. Now then take Pope County below there, was the assessment to the railroad in that case on the acreage basis or was it on a mileage basis, or on valuation basis? Can you tell?

82 A. They assessed the railroad property at \$125.00 per mile, of main track right of way throughout their district.

Q. They assessed it on the mileage basis, is that it?

A. That is the way they fixed it. There were 26.47 miles at \$125.00 per mile.

Q. How did they assess the other property in the district?

A. Lands were assessed as high as \$42.00 per acre.

Q. Did they take the assessment for state and county taxes as the basis, or not?

A. I presume that in addition to an acreage assessment they took fifty per cent of the taxing value in some cases, and

in some cases they went as high as 70 per cent and the assessment on the lands averaged, ran from \$5.25 to \$42.00 per acre. In the towns they assessed the property at approximately 70 per cent of its tax value.

Q. What per cent of the taxable value of the railroad did you have any different value, and can you state what percentage of its assessed value the actual benefits assessed against it is? You haven't the date before you to tell the court and so you can't tell what percentage of the ordinary tax value of the property the assessment of benefits is?

A. I don't quite understand.

Q. The proposition is this? Some of the other property was assessed as high as 70 per cent of the tax value. Now then what I am asking you is do you know what per cent the assessed benefits against the railroad is all the tax value of the railroad?

A. I don't have the value of the railroad, but it would be very small.

Q. For instance the main line mileage, we will take into consideration is assessed by the State Tax Commission through that county at \$25,000.00 per mile, and the side tracks are assessed in addition to that for general taxing purposes \$3000.00 per mile, and your buildings requisite buildings necessary for railroad operations carry another value. Now there are a total of 27.45 miles of railroad main track right of way in this district. In addition to that you would have your side tracks and buildings, but as I understand you there was no percentage basis applied to the railroad for the purpose of assessing benefits, it was just so much a mile?

A. Yes sir, on a benefit basis. And that was agreed on by the representatives of the railroad and the assessors just as in Johnson County.

Q. The way that these various assessments that you have testified about was reached, is in the general way that you have already told the court? It applies to each of them?

A. Yes sir.

Q. Now the next county going on down there is Conway County. What basis was adopted there for the assessment basis of benefits, or other real property in the district?

A. Conway County Road Improvement District No. 2, I don't know whether that is the one that you have in mind—

Q. The ones that you have testified about the agreement with the railroad company?

A. I will give you one here that I have the record on, Conway County Road Improvement District No. 2 embraces 22.14

miles of Missouri Pacific main track right of way. There were 24 miles of highway improved. The assessment of benefits fixed for the Missouri Pacific property averaged \$113.00 per mile.

Q. Now what I am asking you is, was your assessment made per mile or just a lump sum assessment, and then run the miles through that?

A. This is the way the assessment was made in that district. The lands in the district were assessed \$5.70 per acre, a part of it, and the rest of it three to nine dollars per acre.

84 Now a list of the railroad right of way in this district was prepared showing the number of acres right of way in each forty acre tract throughout the railroad land. The assessment per acre on that forty acre tract outside of the railroad right of way was tabulated and they took the various assessments as they would appear in the respective forty acre tracts throughout the district and apply that same rate per acre to the railroad right of way acreage and that appeared as a benefit for the railroad right of way \$113.00 per mile.

Q. In other words, you assessed the railroad property in that district on an acreage basis just like the various tracts of land through which it passed?

A. No, in some cases they considered the valuation of improvements on some of the lands. That is the way they gave an assessed benefit per acre of \$5.70.

Q. How did you reach the benefit to the railroad company compared to the assessment of the remainder of the forty acre tract?

A. The assessment on the remainder was made before the assessment was fixed for the railroad.

Q. Then how did you proportion the assessment for the railroad right of way?

A. I don't get you on that.

Q. You said you took the valuation on the rest of the forty and you applied that to the railroad right of way?

A. No.

Q. What did you say?

A. I didn't do it. The assessors did it. I think they had that arrangement made before I met with them. First, to begin with, as I recall, the assessment on all property in the district was fixed and tabulated, each forty acre tract of land throughout the district was assessed a benefit by the assessing board.

Q. On an acreage basis?

55 A. Some cases it was three to nine dollars per acre, and in other cases it was \$5.70 per acre.

Q. How was the basis an acreage basis?

A. Not altogether; there was some value of improvements on the land considered. Then the railroad acreage in each forty acre tract throughout the district was tabulated. It might be 3.5 acres in this forty acre tract, it might be seven acres on that. It depends on how you struck the forty. Say it was 3.5 acres in the southwest quarter of the northeast quarter of section 10, Township 9 North, Range 26 West, and you find that the lands in that forty acre tract was assessed \$5.40 an acre or \$5.70 an acre, or \$3.00 per acre, or \$9.00 per acre, that same rate or unit was applied to the number of acres of right of way in that forty acres of land, which was the smallest sub-division entered in the book.

Q. You applied the average assessment of that forty acres to the acreage that was actually out of that forty in the railroad right of way?

A. In order to be fair, we didn't average it. We might find that at the extreme it was assessed away low. We took the assessment as fixed for the land adjacent to the right of way in that forty acre tract in order to get what it was.

The Court: As I understand you, you undertook to treat, or the assessors undertook to treat the right of way in the same manner that they did the adjacent lands. That is, that if the adjacent lands were acreage, then they assessed the adjoining right of way in the same manner as the adjoining acreage, and in towns they assessed the right of way in the same way as they assessed the adjoining lots?

A. Well, I don't have any reference to towns in this regard. All I have is the other assessment fixed for the railroad lands throughout the district, which is \$113.00 per mile.

86 The Court: Well, after you got the same total for your own purposes, you divided it by the number of miles? A. Yes.

The Court: The amount, however, had already been ascertained in the way you mentioned?

A. Yes sir.

The Court: The matter of dividing it by the number of miles was your own work?

A. Yes sir.

Q. Now how did you arrive at the value of the railroad property when you got to a town?

A. It wasn't considered.

Q. Do you mean to say that it was not valued at all? The railroad right of way in town was not considered at all in fixing the benefits? A. Yes sir.

Q. That is what I am asking you.

A. You asked me about the valuation. The valuation was not considered.

Q. Well, the assessment of benefits of railroad property in town, how was that reached?

A. I don't recall that. I just have some recollection there of the country property.

Q. You don't know how it was done?

A. Well, I don't. It might have been on a lot basis in the town. I have this that I have in front of me here very clear in mind.

Q. How long is this district? How far does it extend up and down the railroad?

A. It takes in 22.14 miles of railroad.

Q. Does that take you down to the town of Russellville and beyond it, doesn't it?

A. Russellville is in Pope County. It takes in Morrilton?  
87

[—]

A. 22 1/4 miles of railroad.

Q. I say that would carry you through the town of Morrilton? A. I think so.

Q. Then you don't know how the assessment of benefits was arrived at in the town of Morrilton?

A. No, I haven't a statement of that right here.

Q. Now then, in Faulkner County, how did you arrive at the assessment of benefit of railroad property?

A. I did not meet with the assessment board there, as I recall that it was a legislative assessment.

Q. That is about \$2500.00 a mile?

A. I don't know that.

Q. You had no agreement with them in Faulkner County?

A. No sir.

Q. You don't know what that is?

A. That is a legislative determination I understand, and did not meet with the commissioners on that at all.

Q. Did you testify about the assessment of benefits in Pulaski out from the river back this way?

A. Yes sir.

Q. How did you reach the assessment of benefits in that from the Arkansas river back this way?

A. Well, that is north of the river out of Little Rock. Up to the Faulkner County line. Yes, sir, I am very familiar with that. That was made late in 1922 and the railroad right of way outside of the two cities of Little Rock and North Little Rock, all of which two cities are embraced in this district, was assessed a benefit of \$150.00 per mile.

Q. Assessed on a mileage basis?

A. Yes sir. And then that in the towns of Little Rock and North Little Rock, which is a short mileage, was \$300.00 per mile.

Q. It was all on a mileage basis then in this district?

A. Yes sir.

88 Q. How was the other property in the district assessed, do you know?

A. Yes sir.

Q. On an acreage basis, or lot basis valuation basis?

A. In the town of Little Rock and North Little Rock, especially North Little Rock, this road district is paving a part of the streets within the corporate limits. Property abutting this street or streets, is assessed at a greater amount for a distance of 150 feet back on each side than other property, and it was assessed on a per cent of the value arriving at the same value for the property in the district, and then taking a per cent of that and considering that as benefits. That not only occurs in North Little Rock, but it occurs in the city of Little Rock.

Q. Then outside of the town, how did you assess benefits for the other realty property other than the railroads?

A. They considered the improvements on the lands, but I cannot give you that per cent.

Q. It was on a valuation basis?

A. Both valuation and acreage basis.

Q. In the town it was a front basis but outside he is speaking of now. They considered the acreage value and combined the two in assessing the benefits?

A. That is my understanding.

Q. In the town that was a front foot basis and a percentage of the valuation basis also?

A. To make it more clear, the property abutting on these streets to be paved bore a greater benefit than the property we will say 150 feet beyond that, and they were assessed more money. I think they were assessed something like 80 per cent of the entire cost of the street. That would be on a percentage basis then.

Q. The property in the towns were divided into zones and that close to the paving paid the highest rate. The other property did not pay so high a rate?

89 A. The property abutting on the paved street paid a higher rate than the property in town as a whole.

Q. Do you know what the actual mileage of track in Franklin County is, Road District No. 1? I say Franklin County all the time; I refer to Road Improvement District No. 1.

A. There are 24.38 of what we consider main line. There are 6.93 miles of what we call the Altus branch and there are 1.28 miles of what is commonly known as the Coal Hill branch in Franklin County, or in Franklin County Road Improvement District No. 1.

Q. Now, that makes an acreage of what? That is what you have spoken of heretofore as 32.59 miles?

A. Yes sir.

Q. What other track besides that has the railroad in this district?

A. Nothing other than occasional side tracks necessary for the operation of the railroad.

Q. How many miles of occasional side tracks have you?

A. Well, the assessors have that put right on the book.

Q. I thought you had it there. I understand it is over forty miles. I wanted to put it in if you knew.

A. No, I didn't use forty miles.

Q. What I am asking you, if those occasional side tracks in addition to the 32.59 miles, doesn't make a trackage of the rail road company in this district of 44 miles?

A. There are 32.59 miles of main track in the district and between 11 and 12 miles side tracks, which tracks are necessary to this main line that I spoke of.

Q. That would make approximately 44 miles of track of the railroad?

A. If you want to consider a mile of side track with a mile of main line, yes. They are separate.

By Mr. Pryor:

Q. Mr. Warden, you were asked about conference held with the assessors. You held a conference with the assessors of this district?

A. Yes sir.

Q. How many conferences were there, do you remember whether one or more?

A. I believe two, one prior to the date of the hearing of the assessments.

Q. You stated you couldn't remember all the conferences that you had with the assessors of Road Improvement Districts, or the method by which the assessment of benefits against the railroad was determined. How many conferences did you have with boards of assessment commissioners in 1922?

A. I sat with 73 separate and distinct boards of commissioners and assessors in the state of Arkansas during the year 1922.

Q. You were asked about the road district down in Conway County where we were assessed \$113.00 a mile. Do you know how many road improvement districts there are in Conway County approximately?

A. As I recall, which is not very clear, there are five or eight.

Q. You spoke this morning about a statement that you wanted to make as an exhibit to your testimony. Have you that statement prepared?

A. Yes sir.

Q. You may read it now.

“Exhibit B to testimony of R. E. Warden.

“I have compared this average assessment per mile, viz: \$2322.36 in the Franklin County Road Improvement District No. 1, with thirty-two highway projects in the State of Arkansas, embracing 626.8 miles of Missouri Pacific main track right of way, and find that the average benefit assessment per mile is \$206.40. This average assessment per mile is for the main track right of way, including the main track side tracks and all requisite buildings thereon. These side  
91 tracks and buildings are in all cases considered as an accessory of the main line and necessary for the operation of the railroad and the assessment as fixed is per mile of right of way as the trains run. These thirty two highway projects referred to represent nearly one thousand miles of hard surface roads, consisting of gravel, asphalt, concrete and warrenite construction. A representative per cent of this highway mileage is between the cities of Little Rock and Fort Smith.”

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Q. In these other districts that you have mentioned in Johnson, Pope, Conway and Faulkner Counties, are side tracks assessed as part of the main line mileage?

A. They were not assessed separately. It was just so much per mile as the train ran.

Q. You mean then as the right of way?



A. Yes sir.

Q. I believe you stated the Missouri Pacific had 42 miles in Johnson County?

A. (No answer.)

#### Recross Examination

By Judge Evans:

Q. You have now given this statement of average of so much per mile of the various improvement districts in the state through which the road runs, you don't mean to say that the assessment of benefits made it figure out that?

A. Take the total assessment of benefits fixed for the property in these 32 highway district and divide the number of miles of railroad right of way into that total amount of money and it will average \$260.40.

The Court: Regardless of how it was arrived at?

A. Yes sir.

Q. You made reference to a certain district which was divided into zones in order to ascertain the benefits. You were not speaking then of this district in Franklin County?

A. No sir. It was the Johnson County No. 2 assessed their lands on the zone basis.

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92 WILLIAM W. TRIMBLE, a witness sworn on behalf of the plaintiff, testified as follows:

#### Direct Examination

By Mr. Pryor:

Q. Where do you live?

A. Little Rock, Arkansas.

Q. What is your occupation?

A. Division freight agent, Missouri Pacific.

Q. How long have you been with the Missouri Pacific?

A. Fifteen years.

Q. In what capacity during that fifteen years?

A. Starting I was stenographer and been promoted from time to time. The last twelve years I have been in the traffic department, had the duties of soliciting freight and other duties of similar character that is allotted to that department.

Q. Have you made any investigation to determine the effect that the building of a parallel highway or road would have upon the traffic of the railroad?

A. Yes sir.

Q. I wish you would state to the court the result.

Judge Evans: It is the same question we objected to, Your Honor.

The Court: The ruling will be reserved.

Q. I wish you would state to the court the character of the investigations you have made and the results of them.

A. At Little Rock I made personal investigation to develop the cost of loss of business we will say between Little Rock and Benton. There is a paved road out 13 or 14 miles and the balance of the distance to Benton is a good gravel road. The last 18 months or two years there has been trucks operating between these points and they handle 90 per cent of the merchandise business moving between the two towns. Before the completion of this good road and before these trucks began operating, the Missouri Pacific ran a daily pack car from Little Rock to Benton. Our records previous 93 to the time of the truck operation shows that that car averaged from twelve to fifteen thousand pounds of merchandise each day, and we have been deprived of that traffic.

Q. What would that amount to in revenue to the company? What is the amount of it in dollars and cents?

A. Some of that merchandise is rated first class, some second and some third, and some fourth. A fair average would be third class. It would average forty to forty five dollars.

Q. Does the train that formerly carried that merchandise car to Benton run now?

A. That local freight still operates from Little Rock to Gardon.

Q. Now have you made any investigation outside of that? Do you know whether the road as far as it is completed between Conway and Little Rock has affected the railroad company's traffic?

A. That portion of the road between Little Rock and Conway that lies in Pulaski County is not completed, that is, the hard surface road is not completed and the Conway service, or freight service was discontinued there last fall on account of bad road.

Q. You mean the freight traffic?

A. There was a truck operating there last year from Little Rock to Conway but for some reason he has discontinued. I take it it is due to the condition of the road. The road is under construction.

Q. Do you know whether it has interfered with the passenger traffic?

A. The Yellow Cab Company,—I don't know whether it has two or three round trips a day, in a seven passenger car

from Little Rock to Conway. They have got a regular leaving hour at both places.

Q. Is there a good road leading east or southeast between Pine Bluff and Little Rock?

A. There is a fairly good road.

94 Q. Any trucks operated on that in competition with the rail road?

A. Yes sir, down as far as Farrel.

Q. How far is that from Little Rock?

A. I don't know.

Q. Do you know how far it is from Little Rock to Benton?

A. Twenty-three miles.

Q. Is Farrel approximately the same distance?

A. I believe Farrel is 18 or 19 miles. I was never out there. Half way between Little Rock and Pine Bluff, about that.

Q. To what extent has that affected the traffic on that rail-road?

A. That hasn't affected our traffic to the extent it has out to Benson because the road is not yet as good.

Q. Has there been made over the state generally any investigations, or have you made any?

A. Yes sir, our office did.

Q. What was the result of the investigation?

A. Well, that was just an inquiry we sent to our various agents inquiring as to whether or not they had truck competition.

Judge Evans: We think that will be clearly hearsay.

Q. This investigation you made yourself between Benton and Little Rock?

A. Yes sir, personally.

Q. And you say the loss in freight has been from forty to forty five dollars a day?

A. Yes sir; between Little Rock and Benton. In addition to that there is a lumber mill working at Benton that has a sales office in Little Rock. They deliver all their lumber by truck right on the job in Little Rock where it is sold. That is north bound business we call it.

#### Cross-Examination

By Judge Evans:

Q. How long have you been connected with the rail-road company?

95 A. Fifteen years.

Q. And what is your present relation to it?

A. Division freight agent at Little Rock.

Q. What is your territory, over what territory or what lines or portions of lines do you operate?

A. My immediate jurisdiction is Little Rock, North Little Rock and Camp Pike, Benton and Hot Springs.

Q. You are division freight agent for the territory that you speak of now? A. Yes sir.

Q. How long have you occupied that position?

A. Three years March 1, 1923.

Q. What kind of road is it from Little Rock out to Benton? I mean the dirt road? A. There isn't any dirt road.

Q. I mean the highway that you speak of?

A. It is a paved road out about 13 miles.

Q. From what point in Little Rock does the paved road run?

A. I don't know whether you call it down town. I take it from about the court house site.

Q. Out about thirteen miles? A. Yes sir.

Q. Is that the Pulaski County line? A. Yes, sir.

Q. How long has that paved road been in existence?

A. The road was completed the last of my recollection in the fall or winter of 1920.

Q. Now then there is no paved highway and no completed highway from the Saline County line on in to Benton is there?

A. The road is in pretty good condition. Since I have lived there the only completed highway is the 13 miles of paved road I speak of. The balance is good gravel road.

Q. That is just an ordinary dirt road, it is not a highway?

A. Well, I don't know what Webster calls it.

Q. That is not the proposed Little Rock Hot Springs Highway road, has it been completed? A. No.

Q. Has the project been abandoned? A. No sir.

Q. Then it is just an ordinary good road is it?

A. No, I would not term it so.

Q. Twenty-three miles from Little Rock to Benton?

A. That is the railroad mileage. I don't know just what the highway mileage is. I don't think it would vary much.

Q. You say you took by yourself some kind of team?

A. What we call a package car.

Q. How long had that been running?

A. It ran up until the time the truck took the business.

Q. When was that?

A. Right after the completion of this paved surface out to the Saline County line.

Q. Then you have not run it since that time?

A. Not a direct Benton run.

Q. Well, you have through trains that carry all the freight that is offered to you don't you? A. Yes sir.

Q. Are you in a position to say that the revenues of the company derived from traffic from Boston to Little Rock, or Little Rock to Boston are less than they were before that time?

A. I would not say that the revenues were less because tonnage increased every year. I will say this we have still less our head traffic than we handle.

Q. It is a fact since this road has been built the tonnage has been increased? A. Not the entire state business.

Q. Didn't you state that the tonnage from Little Rock to Boston the tonnage carried by your road, and I was asking you about the road from Little Rock to Boston, is that had been increased?

A. You mean to say all of our through business?

Q. No, I mean the tonnage of your business from Little Rock to Boston and from Boston to Little Rock?

A. Our tonnage has decreased. Our tonnage moving from one city to the other.

Q. I thought you stated awhile ago that you couldn't state whether your revenues from Little Rock to Boston or Boston to Little Rock had decreased because the tonnage had increased?

A. I thought you meant this: Had our revenues at Boston increased or decreased. However, you asked me about the revenue on the entire state business.

Q. The business between Little Rock and Boston?

A. They were not increased during the last two years.

Q. Have you made an examination of the books so as to be able to tell that? A. Yes sir.

Q. When did you make an examination?

A. Last year in April.

Q. Why then, when I asked you awhile ago if the tonnage had been increased and you couldn't say whether the receipts were more or less?

A. I was speaking of one particular kind of freight.

Q. What is that? A. Manufactures.

Q. That has been increased?

A. Not in the railroad. I am not speaking of one commodity that we can not get without we ourselves did. I am not satisfied about the great loss is making for good roads. I am not satisfied about all of that interstate general business. I am troubled about business lost.

Q. You testified, as I understated you, that your road had suffered a loss by reason of this mile of paved road and that the use increased on [?] with trucks. Now then what I want you to state is whether or not you think that all the business between the two places has been increased or diminished, or are they the same?

A. The merchandise business?

Q. The whole business?

A. No, I haven't a record of that individual business between those two towns.

Q. You can't state then that your business between Little Rock and Benton has been decreased or increased? You don't know as I understated you?

A. I am only speaking of the business we have lost.

Q. I want to know about the business you have gained.

A. I am not prepared to give you those earnings on the business moving between those towns either before or after.

Q. Then you can't state that you sustained a net loss?

A. I don't quite understand that Judge.

Q. I say your testimony is that a certain character of merchandise sustained on a certain character of train traffic, that you do not carry now? Is that right? A. Yes sir.

Q. That is just as far as you go. You do not state to the court that your road has lost any money on the total of its earnings between Benton and Little Rock on account of the building of this road? A. I haven't figures to show that.

Q. So you don't know whether that is true or not? You don't know Mr. Trimble, as a matter of fact that as the country improves that that necessarily causes more business for the railroad, don't it?

A. It causes more of what might be called foreign business.

Q. It is business that the railroad gets a profit from in hauling between one state and another?

A. If it is an interstate business it is a profit.

Q. Well, if the country improves it necessarily results that the railroad will haul more things from the country.

A. That is a matter of opinion.

Q. Will you please give me your opinion about it.

A. Well, I presume if a community increases in population one thousand people per year it would naturally increase the volume of commodities sent.

Q. And the building of good roads helps to bring people in there for the purpose of living?

A. That is an argument.

Q. Isn't it a fact? A. I don't know.

Q. So you don't know whether the road has been made or lost by reason of the building of this ten or eleven miles of pike?

A. The trucks have only taken that business that is profitable to them. That is all they take. They don't enter to the unprofitable business.

Q. Well, your freight rates are supposed to be based on regulations of the Interstate Commerce Commission, and the railroad commission, and they are put on the basis of profit for the business?

A. What I mean is the trucks only go after business profitable to them.

Q. You talked about running a line from Little Rock to Conway. There is no pike built up that way is there?

A. I think Faulkner County has completed their main from the Pulaski County line to Conway.

Q. Don't you know there is no highway from Levy in Pulaski County to the city of Conway?

A. It is not completed to the Pulaski County line. It is completed beyond the Pulaski County line.

100 Q. Is there a completed highway from Conway in towards Little Rock? paralleling the railroad?

A. Down to the Pulaski County line.

Q. Now what kind of road is that?

A. I understand that is a hard surfaced road.

Q. Have you ever been over it? A. No sir.

Q. Then as a matter of fact, you don't know of that sort or not? A. I could not swear to it. That is hearsay.

Q. Then don't you know anything about the condition of affairs as far as the road business is concerned from Little Rock up to Conway? That is merely hearsay on your part? Is that right? A. Yes, sir.

Q. You can't tell the court then I presume that the company, the Missouri Pacific Railroad Company has suffered any loss at all by reason of any intrastate carriages from Conway to Little Rock and Little Rock to Conway? You can't state that?

A. We have lost no considerable amount of freight between those two towns. There is a bus line operating. I know that of personal knowledge.

Q. But you don't know whether the company has lost money conducting the operation of its business as a whole by reason of this bus line?

A. I suppose we have lost a few passengers.

Q. You don't know but what more passengers have traveled the road into Little Rock or from Little Rock to Conway, than if this condition did not exist?

A. I am not affiliated with that department and haven't much to say about that.

### Redirect Examination

By Mr. Pryor:

101 Q. I believe you have stated that the package loss to the railroad or revenue arising from that traffic between Little Rock and Benton was 90 per cent of the total?

A. That would not be 90 per cent of the total tonnage. I spoke of 90 per cent of the merchandise, less than car load freight; that is the only freight the trucks move.

Q. That is the freight that is carried on local trains?

A. Yes sir, at class rates, highest rates.

Q. You have stated that the loss became so noticeable that the railroad company ordered you to investigate it to ascertain why you had been deprived of it?

A. I was not ordered to investigate. It is my duty to get the traffic for the company and doing that it necessarily followed that I investigated it.

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M. J. Crotty, a witness sworn on behalf of the plaintiff testified as follows:

### Direct Examination

By Mr. Pryor:

Q. State your name, place of residence and occupation?

A. M. J. Crotty, Van Buren, Arkansas.

Q. What is your occupation?

A. Superintendent, Missouri Pacific Railroad.

Q. How long have you been connected with the Missouri Pacific Railroad Company? A. Twenty-three years.

Q. How long have you been superintendent at Van Buren?

A. Since January 1921, January 1st.

Q. Over what territory does your jurisdiction extend?

A. Between Little Rock and Coffeyville, including the branch lines out of Fort Smith.

Q. What do you mean by branch lines out of Fort Smith?

A. Line to Paris and line to Greenwood.

Q. Mr. Crotty, are you familiar with the road that is being constructed by Road Improvement District No. 1 through Franklin County? A. To some extent, yes.

102 Q. Have you been over this road, any portion of it?

A. I was over a portion of it about a week ago.



Q. How long did you say you had been in the railroad business connected with the Missouri Pacific?

A. Twenty-three years.

Q. How long have you been in the railroad business?

A. About forty years.

Q. From your experience and observation what effect does the building of a parallel hard surface highway have upon the traffic of the railroad.

Judge Evans: We object. That is the same question.

The Court: He may answer. The ruling will be reserved.

A. It materially reduces the traffic hauled by the railway. I have had some experience with that in Missouri before I came to this territory on a hard surfaced road out of Kansas City and out of Joplin. Our less than car load tonnage, which is package freight, was reduced 75 per cent on account of the running of trucks. Our local passenger business was reduced about the same amount by the running of automobiles over the hard surfaced lines.

Q. What has been your observation, if any, as to the effect it has had here in Arkansas?

A. Well, I haven't made any check of the lines between here and Little Rock. However, I have observed trucks and passenger carrying automobiles paralleling us from time to time and, one experience that I had was during the holiday season I was requested to furnish sufficient coaches for the pupils from the colleges at Conway and had set out a coach for the purpose of moving those pupils south out of Conway on the evening passenger and when it arrived at Conway they advised the office it was not necessary to pick up the coach as the passengers had all taken automobiles, to  
103 Little Rock. We had hauled that coach from Kansas City to Conway for their benefit.

Q. As to the number of passengers there were to travel on that you don't know?

A. No sir.

Q. Do you know whether or not they have a hard surfaced road from Conway to Little Rock?

A. They have parts. It is not completed.

Q. Does it parallel the railroad?

A. Yes sir.

Q. I believe you have a hard surface road from Fort Smith to Van Buren? A. Yes sir.

Q. Do the railroads get any of the traffic between Fort Smith and Van Buren?

A. No, not of the freight traffic that originates at Fort Smith. We have what we call interline freight that is transferred from interline cars, but there is no freight shipped locally from Fort Smith over there by the railroad.

Q. How is the freight transported?

A. By motor trucks.

Q. I will ask you if the building, in your opinion, the building if this road when completed will be of any benefit to the railroad company?

A. None whatever. It will be on the contrary a detriment as it will move a certain per cent of freight that the railroad company should get, and a certain number of passengers.

#### Cross-Examination

Q. How far is it from Fort Smith to Van Buren by the hard surface road?

A. About four and a half miles.

Q. How far is it from Fort Smith to Van Buren by way of the Missouri Pacific Railroad?

A. About the same distance by way of the Frisco bridge.

Q. But your travel is by way of Greenwood Junction, is it not?

A. No sir, not on merchandise out of Fort Smith. It is all moved over the Frisco bridge.

Q. The trains of the Missouri Pacific railroad, do they cross regularly?

A. The merchandise train between here and points south runs over the Frisco bridge.

Q. What is the distance of the line from Fort Smith to Van Buren over its own line?

A. About ten miles; it goes into Oklahoma.

Q. Now Mr. Crotty, you are speaking now with reference to local business, that there will be so much local business?

A. Well, there is not any other kind of business between the two points unless they would truck heavy freight.

Q. When you speak about a detriment to the railroad company about having a parallel highway in good condition you have reference to local conditions?

A. I have reference to the business that deprived the railroad company of hauling.

Q. Are you prepared to state to the court that the building of a highway, a properly constructed highway, kept up properly, paralleled with the railroad, will not develop the country through which it passes?

A. Paralleling the railroad?

Q. Yes, paralleling the railroad or not paralleling it, are you prepared to state that the building of such a road as that will not help develop the country?

A. I will not state it will not, but I will state this: That the building of hard surfaced roads will deprive the railroad of earnings they should get over that territory?

105 Q. That is local business?

A. That is part of our business.

Q. I am speaking about business in general over that part of the territory, but now then do you not know that the building of hard surfaced road, gravel surface, or any other kind of suitable highway in a community helps to develop that section of the country? A. I do.

Q. Do you not know that the building of such a road and the development of a community increases the business done in that country?

A. Well, it possibly would to a certain extent.

Q. Doesn't it increase the business of the railroad in that section of the country?

A. I can't say that it does. It may increase the business but it does not increase the railroad business.

Q. I am asking you if it does not help the railroad in the matter of its business?

A. Yes, it increases business to a certain extent.

Q. For instance, take this road we are talking about in Franklin County, a good road built there and gravel surface, that helps to develop the country, bring people in and helps to increase the business of that section of the country?

A. Yes sir, but it likewise opens up the competition of the motor truck and the automobile.

Q. But the fact that it does that, does not prevent it also being true that the business of the railroad taken as a whole is increased by that development of the country?

A. Well, it will in time.

#### Redirect Examination

By Mr. Pryor:

106 Q. You mean in time if there is any of the railroad left?

A. I mean that if they can stand up under the competition of motor trucks and automobiles until such a time as the business gets so big that the railroad can't handle it.

Q. Do you know when that will be?

A. No.

Q. They are manufacturing automobiles and trucks every day? A. Yes sir.

Q. I will ask you if the railroad can compete on short hauls with the motor truck?

A. No sir.

Q. Why is that?

A. Because the motor truck has absolutely no maintenance or roadway and another thing they make street door deliveries. The merchant has the advantage of the drayage in connection with the hauling on trucks.

Q. You stated a moment ago that a hard surface road develops the country. Do you mean to say by that that it would also help the railroad?

A. No, it is not my experience. In places they have hard surface roads it has developed the country but has not increased the earnings of the railroad. In other words, it has reduced them.

Q. In your experience how do you regard the motor truck as a competitor?

A. Well, it is one of the strongest competitions there is in existence.

Q. Isn't it a deadly competition?

A. Yes, it is.

#### Cross-Examination

By Judge Evans:

Q. Do you know where the wholesale points for merchandise buyers are with reference to the town of Ozark on this district?

A. Well, Fort Smith on one side and Clarksville on the other.

Q. I am talking about wholesale?

A. Fort Smith is a wholesale town and Clarksville on the other.

Q. Clarksville is not a wholesale town?

A. Yes sir.

Q. They are merely jobbers there?

A. Yes, there are jobbers and there is some manufacturing.

Q. If it develops at Clarksville that they have wholesale houses there that has to be hauled over your road from Little Rock or Fort Smith?

A. Yes sir.

Q. Now then, you know that so far as Fort Smith is concerned that is the nearest wholesale point for lumber?

A. Yes sir.

Q. You know in Crawford County they have no connecting line with this road completed in Franklin County?

A. Not as yet that I know of.

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C. E. CARSTARPHEN, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Pryor:

Q. What is your name?

A. C. E. Carstarphen.

Q. Where do you live?

A. Fort Smith, Arkansas.

Q. What is your business?

A. Division agent for the Missouri Pacific Railroad.

Q. How long have you been connected with the Missouri Pacific Railroad?

A. Thirty-five years.

Q. In what capacity, Mr. Carstarphen?

108 A. Well, most of my time has been put in with the traffic department, freight department.

Q. What are your duties as division agent of the company at Fort Smith?

A. To look after the securing of Traffic largely, and things that go with that. Look after the general business of the company at all points in certain territory, get the traffic and get all I can out of it.

Q. Are you acquainted with the conditions that exist in Franklin County, in the Ozark District of Franklin County with reference to the road that is being built through the county? A. No sir.

Q. You have never seen the road or any part of it?

A. No, I don't think I was ever over any part of it.

Q. How far does your jurisdiction extend here as division agent?

A. On the Missouri Pacific Railroad from Coffeyville, Kansas, to Hartman, Arkansas, and the Greenwood branch.

Q. Hartman is in Johnson County?

A. Yes.

Q. It takes you through Franklin County north of the river? A. Yes sir.

Q. Have you in your experience observed the effect of the building of a hard surfaced road or improved highways paralleling a railroad?

Judge Evans: The same objection.

A. It is detracting from the traffic, yes sir.

Q. I asked you if you had observed the effect?

A. Yes sir.

Q. What effect has it had?

A. It has deprived us of a great deal of local business where we have had certain package cars operating from  
100 a point to a point within a short distance, say 30 or 40 miles, we have practically lost all that business.

Q. Does that constitute any considerable portion of the traffic of a railroad?

A. Yes, we consider it very attractive traffic.

Q. You mean by that the revenue is considerable?

A. Well, it is short haul stuff, and the rates are not high but there is a pretty good volume of it and carries a fair rate and by getting that traffic daily, it is rather remunerative business, business that we like to get.

Q. Do you have to run the trains anyway whether there is traffic or not?

A. Exactly so, yes, sir, we try to operate these cars every day or every other day at the present time.

Q. From your experience, Mr. Carstarphen, take the blue print which is marked Exhibit A showing the location of the highway through Franklin County, and the railroad, the railroad shown indicated by the red lines and the dirt road indicated by the yellow lines, what effect would the building of a hard surfaced highway have upon the traffic of the railroad?

Judge Evans: We object.

The Court: The same ruling.

Q. As to whether business would be decreased by reason of that highway?

A. As I stated before, from certain points to certain points it is doing it.

Q. Would that road be of any benefit to the railroad company? A. No, not from a traffic standpoint.

Q. That is all that a railroad has that produces revenue, isn't it?

110 A. That is all we sell.

Q. Anything that deprives you of the traffic injures the business of the railroad?

A. Yes sir.

Q. Have you observed in your experience, do you know of any specific instances where the building of such a road paralleling the railroad has had the effect of taking away its traffic?

A. Well, I might recall the first hard surface road built in this country.

Q. What effect did that have?

A. Absolutely took it all. Somebody did. We haven't had any since it was completed.

Q. Do you know what the amount of traffic was before the building of the road?

A. No, I couldn't state as to that. I know prior to the building of the hard surface road that we had a car every day between Fort Smith and Van Buren. The freight hauled in that car was made up here from the different jobbers in all the different lines, and it was loaded that day and got out that night and delivered in Van Buren either that night or next morning. After the hard surface road was built the business gradually decreased until at this time I don't presume there would be over 5 per cent of the traffic moving between fort Smith and Van Buren aside from business that is delivered to us by connecting lines, that is, that is hauled from one railroad to the Missouri Pacific depot and goes to Van Buren that way.

Q. But from the local wholesale houses in Fort Smith?

A. Nothing, absolutely nothing.

Q. How is the freight transported?

A. By motor truck. Prior to the motor truck it was hauled by wagon.

111 Q. After the building of the hard surface road they have regular motor truck lines operated out of Fort Smith now, that you know of?

A. Well, I don't think there is any regular companies or corporations, but the business is generally done by individuals either in Van Buren or Fort Smith. I don't think there are any regularly organized companies. I don't know of any, but a man will get hold of a truck or two and go into the business and stay with it a while and sell it out and somebody else picks it up. I tried several times to find where there were organized companies, but didn't make much headway.

Q. There are a number of individuals though that haul this freight for hire?

A. Yes, a great many of them.

#### Cross-Examination

Q. The long hauls can be carried much more cheaply in proportion than short hauls, can they not?

A. They are, yes.

Q. Those short hauls and this short transportation are expensive hauls to the railroad company, are they now?

A. Yes sir.

Q. So that they are not regarded as profitable by the company, are they?

A. Yes, we like that business very well.

Q. But you often do it at an expense in order to keep up your general through business?

A. Well, probably so, yes.

Q. You carry freight between local points frequently  
112 at probably a loss to that particular business, but it is to keep up your general business?

A. I think so.

Q. Now then, Mr. Carstarphen, you stated a while ago in response to the inquiry of Mr. Pryor that this building of the highway would from a traffic standpoint, would not be a benefit to the railroad. In what way would the building of the highway under review be a benefit to the railroad?

A. Well, I can't see from a traffic standpoint how it would be any benefit.

Q. You said, if I inferred correctly from what you said, there was no way in which it would be a benefit to the railroad? You didn't state that, but I want to know if that is correct?

A. I don't get you exactly, Judge.

Q. Let me ask you this question: The building of a highway, that is, a good road in a community, helps the development of the country?

A. Yes sir.

Q. Well, whatever helps to benefit the community helps to benefit the railroad?

A. It should, yes sir.

Q. It does, doesn't it?

A. I don't know that it would increase their local business any.

Q. I am not talking about the local business. I am talking about the business that it does as a common carrier of freight and passengers from all the points it serves, to all the points it serves?

A. Well, I would say yes.

Q. If the country is developed that is served by the railroad then that necessarily inures to the benefit of the railroad in the way of business, doesn't it?

113 A. Yes sir.

Q. If the line of road other than the railroad which helps develop a country parallels the railroad, it may take away some local business but it helps develop the country and thereby benefits the railroad in its general business, doesn't it? A. Yes sir.



Q. This hard surface road from Fort Smith to Van Buren has been one of the agencies for the development of this section of the country, Fort Smith and Van Buren, has it not?

A. I don't know as to that; I couldn't say.

Q. But you do know that along with the building of the hard surface road between Fort Smith and Van Buren there has been a general up-building of this section of the country? You know that is true?

A. Yes sir.

Q. Probably been lots of other things besides that, but that has been going along with it?

A. Yes sir.

Q. And the business of the railroad has been increased during these years from the time before there was a hard surface road and since then, by reason of the development of the country? A. I think so.

#### Redirect Examination

By Mr. Pryor:

Q. How much of that increase in the population of Fort Smith, or the development of the country do you attribute to the building of this road from here to Van Buren? How many people has it brought into Fort Smith? Do you know of a one? A. I couldn't say, no.

Q. Well, you don't know what effect it has had so far as the development of the country is concerned?

114 A. Except in a general way.

Q. If a hard surface road would develop the country and develop motor truck business, and take all the business away from the railroad it would destroy it? Would it not?

A. Certainly would.

Q. Hasn't that been your observation with hard surfaced highways that it takes traffic away from the railroad?

A. Yes, it does it every day.

Q. Has your observation extended any further than Arkansas in that respect?

A. Arkansas and Oklahoma.

Q. You have never been to California?

A. Yes, I certainly [do].

Q. Do you know what the conditions are there?

A. I certainly do.

Q. State what the conditions are with reference to roads—

Judge Evans: He has already testified about that. He is having him restate it. I object to it for that reason.

The Court: He may answer, and then you may cross-examine him on that.

Q. Have you observed the effect of the traffic on the condition of the land surface south of this river?

A. I noticed it more particularly in Colorado two years ago. I made some inquiry out there regarding the business from the largest shipping point of Phoenix to those little mountain towns.

Q. You were there?

A. Yes sir.

Q. Did you observe the conditions?

A. I just simply asked the railroad men in that country.

Q. Did you see trucks running on the highway there?

A. I did about that close together. Well, on one occasion between Long Beach, between there and Los Angeles, I think it is 25 miles, we had one freight and had to stop along a hard surface road so the one was freight, and it was like Indian people were passing there on foot.

Q. What were they doing?

A. They were simply going one way and hauling freight the other and some times hauling freight both ways.

Q. Do you know for what distance they operate out there in California where they have the hard surface roads?

A. No, I don't. I think probably the heaviest traffic is between the lines, the ones I just spoke of, 25 miles.

Q. You spoke a moment ago about Colorado. What effect has hard surfaced road building along the Colorado Railroad?

The Court: Personal knowledge would mean personal observation. It would not mean information from somebody else. I understood Mr. Cunningham to state to make inquiry of railroad men, that his information was obtained that way. That is subject to the objection that is made. Now the distance that he has given in California, that is a different matter. He was there and observed it to the length of time that he states. I think there is clearly a distinction. It is true that he was endeavoring to affirm the proposition, but he affirmed it in a way that did not permit him to affirm it by his own observation, by seeing it with his own eyes. He would have gone to Colorado to have found that out.

Q. Have you been in Colorado lately?

A. Two years ago.

Q. How long were you out there?

A. Thirty days.

Q. Were you on the line of any railroad? A. Yes.

Q. What road?

A. I was on the line of the Colorado Southern out of Denver where I spoke about being.

Q. Were you ever as far as Boulder?

A. Yes, I was in Boulder.

Q. How far is Boulder from Denver?

A. I think they call it about 60 miles.

Q. Have they a hard surface highway from Denver to Boulder, Colorado?

A. Yes sir.

Q. I will ask you if you observed while you were out there how the traffic was transported from Denver to Boulder and Boulder to Denver?

A. Yes sir.

Q. How is it transported?

A. The merchandise or what we call less than car load freights are transported by motor trucks, large motor trucks between Denver and Boulder.

Q. How frequently were they run over that road?

A. I couldn't say how frequently, but very frequently because we passed lots of them going and as we were coming back they were thick. They had everything pretty near in the way of less than car load freight, household goods, oil, groceries and commodities of that nature.

Q. Did you make any observations while you were there, or were you in a position to observe the traffic on the highway paralleling the Colorado Midland?

A. No sir. This was the Colorado Southern that I was talking about.

Q. You say that is less than car load freight?

A. Yes.

117 Q. I understood you to answer Judge Evans that some of that freight is carried at a loss by the railroad? Did you make that statement?

A. Well, in this way: Some times these cars are loaded very heavy. Sometimes they have ten or twelve thousand pounds in them. In a case of that kind it is very profitable, but where it gets down to five hundred or a thousand pounds, then it would not be profitable.

Q. If you have to haul the car and you run the train anyway, does it cost you any more? A. No.

Q. Aren't you required to run daily local freights?

A. Yes.

Q. Does it cost any more to operate one of them when they are hauling heavy traffic, than when they are hauling empty cars?

A. I shouldn't think it would since they have got to make the trip anyway.

## Recross Examination

By Judge Evans:

Q. Mr. Carstarphen, you are not prepared to state whether the road development in California or road development in Colorado has increased the business in that section of the country? A. I couldn't say as to that.

Q. You would not undertake to say that the railroads do not make more money now? A. I couldn't say.

Q. This development of the country has increased their business?

A. I only know that the trucks do a very heavy business.

Q. Some times the development of a community make business for everybody? A. Yes.

Q. Like the labor saving machinery that comes in, although the machine does do lots of work there is still work for everybody?

118 A. Yes.

Q. Isn't that a fact that the increase of business will be taken care of in various ways?

A. I presume that is true to some extent.

Q. Now as far as California is concerned, the place where you saw the motor trucks traveling with fruits and vegetables, You spoke of the trucks being loaded. What were they loaded with?

A. All kinds of less than car load freight, merchandise, household goods, groceries and stuff of that kind.

Q. Was that in the section where the small truck farms are?

A. Yes, I think there were some of those along there.

Q. And the products of those truck patches had to be gotten to market and the proceeds carried back?

A. My attention was not called to that particularly.

Q. There was a railroad between these two towns?

A. Oh, yes, several of them.

Q. But when it comes to hauling perishable freight a short distance by the railroad, unless you have refrigerator cars and things of that sort, you can't do that?

A. Yes, you have to have refrigerator cars.

By Mr. Pryor:

Q. They haul it on passenger trains right along?

A. Oh, yes.

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WILLIAM W. TRIMBLE, being recalled by the plaintiff, testified as follows:

## Direct Examination.

Q. Do you know whether there are any empty truck companies operating from trucks out of Little Rock?

A. I don't believe there is but one incorporated company. The others are individuals that live in the towns to which they are hauling the freight from Little Rock.

119 Q. Do you know whether they have any at Benton that haul?

A. At the time I made the investigation there were three living at Benton that operated trucks in this intrastate merchandise business.

Q. How many were at Little Rock?

A. The company that I understood to be incorporated, the T. & L. truck line, did not operate to Benton.

Q. Where did they operate, on some other road?

A. Three individuals were operating trucks to Benton.

Q. How many in Benton operating to Little Rock?

A. The same three. They resided at Benton and their practice is to go in at morning and get their load and go back.

Q. How many are there other persons, firms or corporations operating as a business for the purpose of hauling freight from Little Rock to other nearby towns, do you know?

A. Well, that changes you know from time to time.

Q. They change ownership?

A. Last April when I made up this data there was six or seven different lines operating out of Little Rock by individuals.

Q. How many trucks would each one of these individuals operate? A. I didn't develop just that.

## Cross-Examination

By Judge Evans:

Q. The trucks from Little Rock to Benton and from Benton to Little Rock were operated by three persons who lived in Benton? A. Yes sir.

Q. They just operated three trucks did they?

A. They might have put another truck in service when they had the business offered.

Q. But regularly?

A. Three trucks would haul the merchandise nearly every day.

Q. What was the tonnage of those trucks?

120 A. I have seen three and a half ton trucks there.

Q. What were those three trucks that operated between Benton and Little Rock, what was their tonnage?

A. I haven't their rating.

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Mr. Pryor: I desire to offer the deposition of COLONEL J. M. SEIBERT.

"Please state your name, age, residence and occupation.

James M. Seibert; 75 years of age; residing at St. Louis, Mo. I am the real estate and tax commissisoner of the Missouri Pacific Railroad Company and have held this position with it and its predecessor the St. Louis, Iron Mountain & Southern Railway Company, since January 1st, 1912.

No. 2. State whether or not you are familiar with the property of the Missouri Pacific Railroad Company embraced in Franklin County Road Improvement District No. 1 Franklin County.

I am familiar with the value of Railroad property belonging to the Missouri Pacific Railroad Company embraced in Franklin County Road Improvement District No. 1.

No. 3. If you state that you are familiar with said property, please state how it is assessed for general taxation purposes and about what per cent of its value is assessed against it by the State Tax Commission.

The property of the Missouri Pacific Railroad Company in Arkansas is assessed at at least 60% of its cash value, while the Tax Commission of Arkansas attempts to assess and alleges that it does assess the property of this Railroad at 50% of its cash value. From my knowledge of the property and its value, I feel that they have assessed it at not less than 60% of its actual tax value for state and county taxation purposes.

No. 4. Please state whether or not, as real estate and tax agent of the Missouri Pacific Railroad Company, you have observed the effect of the construction of improved highways paralleling its line of road and as to whether or not it has been a benefit or a detriment to the Missouri Pacific  
121 Railroad Company, giving your reasons therefor.

During the time I have been connected with this railroad in the capacity above stated, I have observed the construction of improved highways paralleling the road and while I have no definite figures on the subject, my observation and investigation has led me to the conclusion that these improved highways in taking from the railroad both passenger and freight traffic, is more of a detriment to the railroad than a benefit.

No. 5. Please state whether or not you are familiar with the values of real estate and farm lands in Franklin County

and as to what per cent of the actual value of said lands is assessed against them for the purpose of general taxation.

I am more or less familiar with the values of real estate and farm lands in Franklin County, Arkansas, and hesitate not to say that in my opinion said lands are assessed for the purpose of general taxation on a basis of not to exceed 35% of the actual value of same.

(Signed) J. M. SEIBERT.

### Cross Interrogatories.

No. 1. Have you ever lived in Franklin County, Arkansas? If not, how often have you been in said county and when?

I have never lived in Franklin County, Arkansas, nor have I ever been in said county during the last three years.

No. 2. How much of your time within the past three years have you spent in Franklin County, Arkansas.

None.

No. 3. Have you any personal knowledge of the real property values in said county at the present time?

I have a general knowledge of the real property value in said county at the present time.

No. 4. Is it not true that anything that develops the territory which a railroad serves must necessarily be of benefit to the railroad?

It is true that anything that develops the territory which a railroad serves will, to a greater [of] less extent, benefit the railroad in a general way only, and in all cases where these Special Improvement Districts are formed and a highway is constructed paralleling the railroad, it serves as a competitive means of transportation in taking from the railroad both passenger and freight traffic, and is a serious detriment in lieu of a benefit.

No. 5. Is it not true that good roads is one of the greatest agencies for the development of any territory, particularly such a territory as that of Franklin County, Arkansas?

It is true that a system of good roads is a great agency for the development of any territory in Franklin County or elsewhere.

No. 6. Do you not know that the assessment of benefits in this case was made against the railroad in exactly the same

way that it was against other real property in the road improvement district, that is the same percentage of the assessed value which has been made under the state law for purposes of general taxation?

I do not know that the assessment of benefits in this case was made against the railroad in exactly the same way that it was against any other real property in the Road Improvement District, or on the same percentage of assessed value which had been made under the state law for the purpose of general taxation. If the assessment against the railroad property in said district in Franklin County has been made on precisely the same basis in proportion to true value as that of other property, it is the first instance within my knowledge where such a condition exists, in said state. My opinion is that the lands and improvements in Franklin County, Arkansas, are not assessed for purposes of general taxation, on a basis to exceed 35% of true value, whereas, the railroads, I am confident, is assessed by the State Tax Commission, on a basis of not less than 60% of true value.

(Signed) J. M. SEIBERT."

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Mr. Pryor: We offer the deposition of C. L. STONE.

"No. 1. Please state your name, age, residence and occupation.

C. L. Stone, 56 years, residence: St. Louis, Mo., occupation: Passenger Traffic Manager, Missouri Pacific Railroad Company.

123 No. 2. If you state that you are Passenger Traffic Manager of the Missouri Pacific Railroad Company, please state whether or not you have observed, in your position, the effect of the construction of improved highways paralleling its line of railroad.

I have.

No. 3. Please state what effect, if any, said improved highways have had with reference to depriving railroads of passenger traffic.

Figures furnished by our accounting department and affecting districts where our lines are paralleled by good roads indicate quite clearly that practically the greater portion of the short haul passenger traffic business is moving either via publicly operated or private owned automobiles.



No. 4. Have you observed the effect that it has had in portions of Arkansas where improved highways have been constructed paralleling the line of the Missouri Pacific Railroad Company?

Yes. Information tabulated from reports of our agents in the early part of 1922 and at a time when traffic was at its lowest covering regularly operated auto busses and jitneys exclusive of privately owned cars indicates that the approximate loss per annum in the State of Arkansas totals \$150,000.00. As these roads are completed from time to time naturally the loss in revenue will become greater.

(Signed) C. L. STONE.

Cross Interrogatories.

No. 1. Have you ever lived in Franklin County, Arkansas? If not, how often have you been in said county and when?  
No.

No. 2. How much of your time within the past three years have you spent in Franklin County, Arkansas? None.

No. 3. Have you any personal knowledge of the real property values in said county at the present time?  
No.

124 No. 4. Is it not true that anything that develops the territory which a railroad serves must necessarily be of benefit to the railroad?

Not always. In the case of good roads paralleling a common carrier it is a detriment to the carrier. On the other hand if good roads are built out into the country for the purpose of bringing people and products to the Railroad station, then I would say yes. No. 5. Do you not know that the assessment of benefits in this case was made against the railroad in exactly the same way that it was made against other real property in the road improvement district, that is the same percentage of the assessed value which had been made under the state law for purposes of general taxation?

I presume that is a fact, however, I have no positive knowledge as to this.

(Signed) C. L. STONE."

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Mr. Pryor: We now offer the deposition of D. R. LINCOLN.

"No. 1. Please state your name, age, residence and occupation.

D. R. Lincoln, 48 years, St. Louis, Mo., Assistant Freight Traffic Manager, Mo. Pac. R. R.

No. 2. If you state that you are the Assistant Freight Traffic Manager of the Missouri Pacific Railroad Company, please state whether or not you have observed the effect of building improved highways paralleling the lines of the Missouri Pacific Railroad in Arkansas.

I have.

No. 3. Please state what effect, if any, the building of such improved highways paralleling the lines of the Missouri Pacific Railroad Company in Arkansas has had upon its freight traffic.

The effect of the construction of such improved highways paralleling the lines of the Missouri Pacific Railroad in Arkansas has been to seriously curtail the tonnage of the railroad company.

No. 4. Please give fully the reasons why the building of such improved highways paralleling the railroad has had a detrimental effect upon the traffic.

With the completion of such improved highways and 125 after they have been opened for public use there has developed keen competition with automobile trucks operated by individuals and companies for the transportation of merchandise. This competition has served to attract to the automobile truck service in many instances a large portion of the merchandise tonnage formerly handled by rail; in other instances practically all such tonnage. All of which has been detrimental to the rail carrier in that it has suffered a loss of such revenue.

No. 5. Please state whether or not you are familiar with the road that has been constructed under the provisions of the act creating Franklin County Road Improvement District No. 1, and state whether or not in your opinion, it will be a benefit or a detriment to the freight traffic of the railroad company.

While I am not familiar with the road that has been constructed under the provisions of the act creating Franklin County Road Improvement District No. 1, it is my opinion based upon the results in other parts of the state of Arkansas that the benefits to the railroad company would be negligible and that the detriment would be considerable.

(Signed) D. R. LINCOLN."

## Cross Interrogatories.

No. 1. Have you ever lived in Franklin County, Arkansas? If not, how often have you been in said county and when?

Have never lived in Franklin County, Ark., nor have I ever been in said county.

No. 2. How much of your time within the past three years have you spent in Franklin County, Arkansas.

None.

No. 3. Have you any personal knowledge of the real property values in said county at the present time?

No.

No. 4. Is it not true that anything that develops the territory which a railroad serves must necessarily be of benefit to the railroad?

Not necessarily.

No. 5. Is it not true that good roads is one of the greatest agencies for the development of any territory, particularly such a territory as that of Franklin County, Arkansas?

I believe that the construction of good roads is an agency for the development of the territory such as that of Franklin County, Arkansas. But the benefits of the same do not accrue either to all interests. There is particularly one where good roads are constructed paralleling and in direct competition with the carriers, when such construction is for the detriment rather than the benefit of such rail carriers.

No. 6. Do you not know that the assessment of benefits in this case was made against the railroad in exactly the same way that it was against other rail properties in the land improvement district, that is the same percentage of the assessed value which had been made under the same law for purposes of equalized taxation?

I have no knowledge as to the manner in which the assessment of benefits in this case was made.

(Signed) H. H. LINDSEY

J. S. TURNER, a witness sworn on behalf of the plaintiff, testified as follows:

### Direct Examination

By Mr. Pryor:

Q. Your name is J. S. Turner? A. Yes sir.

Q. Where do you live?

A. Ozark, Arkansas.

Q. Are you acquainted with Mr. M. B. Conatser, Jerome Wilson and F. W. Greer?

127 A. Yes sir.

Q. Do you know what position they hold with reference to Road Improvement District No. 1?

A. Mr. Wilson is at present Commissioner. Mr. Conatser and Greer were former commissioners of Road Improvement District No. 1 of Franklin County.

Q. I will ask you to examine the paper I now hand you and ask you if that paper contains the signatures of Mr. M. B. Conatser, Jerome Wilson and F. W. Greer.

A. Yes sir.

Q. Are you familiar with their handwriting?

A. Reasonably so.

Judge Evans: That is not denied.

Q. Do you know whether the letter I now hand you was signed by Mr. Conatser? Does that bear Mr. Conatser's signature?

A. It looks very much like Mr. Conatser's signature.

Mr. Pryor: I desire to offer this letter in evidence.

THE COURT:

Road Improvement District No. 1  
of Franklin County

Ozark, Arkansas, 11-22-14

J. S. Pryor

For Plaintiff, etc.

Wm. S. Lee

Have had herewith statement of agreement with J. S. Turner.

Wm. S. Lee

Mr. H. W. WATKINS, Chairman

"Ex. D, JKP.

Ozark, Arkansas, Nov. 20, 1919.

To Mr. T. B. Pryor,  
General Attorney for M. O. P.,  
Fort Smith, Arkansas.

We the undersigned Commissioners of Road Improvement District No. one of Franklin County hereby agree to accept from the Missouri Pacific Railway Company as assessment of benefits in the construction of said improvement against said company the sum of Two Hundred and Fifty (\$250.00) Dollars per miles, which mileage includes the main line through Franklin County, and the line from Ozark Junction via Denning to Johnson County line, and the line from 128 Denning Yards to Johnson County line connecting Denning Yards and Coal Hill. The said Assessments of benefits to be paid by said Company as other assessments are paid. This offer and agreement to be governed by Act No. 58 of the Acts of Arkansas for the year 1919. This offer is open for 15 days from date.

Given under our hands this 20th day of November, 1919.

M. B. CONATSER, Chm.  
JEROME WILSON, Treas.,  
F. W. GREER, Secy.

(Seal)

Commissioner of Road Improvement  
District No. One of Franklin County,  
Arkansas.

Q. Will you say Mr. Pryor, do you hold any other position in the State of Arkansas?

A. I am a member of the State Highway Commission.

Q. Have there ever been a member of the State Highway Commission? A. About five years.

Q. But you are treating the assessment of benefits against the Missouri Pacific with the M. & St. Louis?

A. Yes sir.

Q. The state is a letter that I have just handed to you addressed to me. "Where had the statement of agreement with J. S. Pryor?" But you have no agreement with him.

A. It is my recollection that you called me over the telephone with reference to the matter of benefit assessments against the Missouri Pacific Railroad Company by Road Improvement District No. 1 Franklin County, and mentioned

me to state to the Commission that the Missouri Pacific Railroad Company would make a compromise agreement of \$250.00 per mile for the mileage through Franklin County. That letter, I presume is an acceptance of that proposal.

Q. You don't know anything about the written proposal that was submitted after that?

A. No sir, I think this is the first time I ever saw that.

DAVE PARTAIN, a witness sworn on behalf of the plaintiff, testified as follows:

### Direct Examination.

129 Q. Mr. Partain, I hand you what purports to be a proposal settlement of the assessment of benefits against the Missouri Pacific Railroad Company signed by M. B. Comtser, Jerome Wilson and F. W. Greer, Did you write that proposal?

A. No sir, I did not.

Q. Was it prepared in your office?

A. Well, I was associated with Mr. Carter at that time. It is my understanding that it was.

Q. Did Mr. Carter write it, or do you know?

A. I couldn't tell you. I wasn't there at the time it was written. That is my understanding, but I don't know of my own knowledge.

Jerome Wilson, a witness sworn on behalf of plaintiff, testified as follows:

### Direct Examination.

Q. Mr. Wilson, you are one of the commissioners of Road Improvement District No. 1 of Franklin County?

A. Yes sir.

Q. Is that your signature Mr. Wilson?

A. Yes sir.

Q. Is that the signature of Mr. Comtser and Mr. Greer?

A. Perhaps not, I would never know.

Q. Were you the treasurer of the district?

A. Yes sir.

Q. Who composed the district at that time Mr. Wilson?

A. Mr. Comtser, Mr. Greer and myself.

J. S. TURNER, being recalled by the defendants, testified as follows:

Direct Examination

By Judge Evans:

Q. Mr. Turner, you are a member of the State Highway Commission and you have lived in Arkansas a great many years? Born and reared in the great state of Arkansas?

A. Yes sir.

120 Q. Well, Mr. Turner, please state to the court what effect the building of highways has on the development of a country?

A. Well, the building of highways usually tends to develop the country through which they go.

Q. Is that one of the greatest agencies that we know for the development of the country?

A. Well, of course the highway department thinks so.

Q. Does the building of highways and the development of the country as a consequence thereof, bring about as the ordinary result, any increase of business in that section?

A. As I stated, we think it does.

Q. That is your opinion anyway?

A. Yes sir.

Q. Now then taking the case that we have here before us of the highway in Franklin County; you are familiar with the highway and railroad and whole situation, that is, you are familiar with all conditions existing?

A. I don't know that I could say I am familiar with the railroad company's affairs.

Q. But you are familiar with the situation of the Railroad and the situation of the highway and the development in the country? A. Reasonably so.

Q. Well, you have no knowledge of the railroad company's business at this time, but at one time you were agent at Ozark or Altus? A. Altus.

Q. What in your opinion is the effect of building this highway upon the revenue of the Missouri Pacific Railroad? Will it be a detriment to it, or will it not be a benefit?

A. Well, from some standpoints a benefit, and other perhaps a detriment, but as a whole perhaps a benefit.

Cross-Examination

By Mr. Pryor:

Q. Mr. Turner, you stated a moment ago that you had submitted this proposition of \$250.00 a mile, a compromise settlement as you termed it, to the members of this  
131 Road Improvement District? A. Yes sir.

Q. That I had authorized you to do so over the phone?

A. Yes sir.

Q. You were then also a member of the State Highway Commission, were you not?

A. I think so.

Q. And you merely submitted it to them for their consideration. Did you urge them to accept it or not to accept it?

A. I certainly did not.

Q. But you were interested in having the matter settled?

A. I would like to have had the matter settled. I submitted it at your request.

Q. You submitted it just like any other citizen would?

A. I didn't submit it officially, Mr. Pryor.

Q. I mean at that time you were interested in good roads?

A. Yes sir, and still am.

Q. You stated a while ago that the Highway Department was the only agency for building up a country?

A. No, I didn't state that was the only agency; I stated that was a great agency.

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M. B. CONATSER, a witness sworn on behalf of the defendants, testified as follows:

Direct Examination

By Judge Evans:

Q. Your name is M. B. Conatser?

A. Yes sir.

Q. You live at Ozark?

A. Yes sir.

Q. Lived there for a number of years?

A. Born there.

Q. Were you one of the Commissioners of Road Improvement District No. 1 of Franklin County?

A. Yes.

132 Q. How long did you serve as commissioner of the district?

A. Well, about a year and a half, I think.

Q. I hand you what purports to be a proposal with regard to the assessment of benefits against the property of the Missouri Pacific Railroad Company which purports to be signed by yourself, Jerome Wilson and F. W. Greer. Mr. Wilson and Mr. Greer at that time were acting as commissioners with you.

A. Yes. Yes, we signed it.

Q. You signed that?

A. Yes, the 20th day of November 1919. That is my signature there.



Q. Do you recognize it as being the signature of Mr. Greer?

A. No, I don't believe I am familiar enough to.

Q. I will ask you if this is your letter? A. Yes.

Q. Transmitting that to me? A. Yes.

Q. Do you recall, Mr. Conatser, receiving a letter from me a few days after you had mailed your proposal to me on which the proposition on behalf of the Missouri Pacific was accepted?

A. I don't recall just now how that was.

Q. You haven't the files then?

A. No sir.

Mr. Pryor: We desire to offer in evidence the letter from Mr. Conatser.

The Court: It will be received.

#### Cross-Examination

Q. How came you to sign that paper, that proposition to accept the assessment of \$250.00 a mile? How did that come about please?

Mr. Pryor: We object, if Your Honor please, as the evidence will tend to contradict the written contract. The contract is in writing.

The Court: He may answer.

Mr. Pryor: We save an exception.

133 A. Well, there was several circumstances.

Q. Just briefly.

A. Well, Mr. Pryor was down there, and some other agents. I don't know,—they made a number of propositions, and he left the impression you know, that the railroad company would not pay; there would be a law suit and a long one, and so on. But all at once he comes down there with an offer a good deal larger than he had made, \$250.00 a mile and we thought that was a pretty good proposition, and Mr. Partain was out at that time, I believe, and so we signed this letter and sent it back. I believe then I met Mr. Partain and he says "You can't do that. You have got no authority to do that." And then I went to Judge Rose, and he says "You can't do that." And we decided,—this other case—Mr. Pryor was in possession of some law decisions that we had not got. And so we just let the matter rest that way, and there it is yet.

Q. Go ahead.

A. Well, that is about all. We didn't know about these decisions and so on, but supposed Mr. Pryor did, and we thought that was pretty good. From \$84.00 a mile to \$250.00 a mile, and we just jumped right in.

By Mr. Pryor:

Q. You were satisfied with it at the time that you signed the proposition? A. Yes.

Q. Now, Mr. Conatser, you say that I was there. As a matter of fact, I was not there?

A. No, not right at that time. You called Turner over the phone.

Q. Yes, to authorize J. S. Turner to give them the contract. And that was satisfactory with all three of the commissioners?

A. They accepted it.

Q. And then afterwards you heard of a decision of the Supreme Court? A. Yes.

Q. That made you then repudiate your agreement?

A. No, that wasn't altogether it. We repudiated it because,—I met Dave as I went up the stairway and he says: "You can't do that at all. You have got no authority." Then I went to Judge Rose at Little Rock and he says, "You can't do that at all." Of course, we had done signed the contract. We felt like we had not had a lawsuit over the district, and this is the only one we have had. We had not had any and we thought we would like to keep out of a lawsuit if we could, and go along with the work and the building of the road. That was the object. Then I went to my partner, Mr. Hill, who was on the Board of Assessors, and he says: "No, I assessed the railroad just like I assessed the individual and we can't make any compromise."

Q. Mr. Hill was a partner of yours in business?

A. Yes.

#### Cross-Examination

By Judge Evans:

Q. Mr. Conatser, Mr. Pryor was asking you about your judgment in regard to the matter. You had nothing to do with the assessment of benefits and you did not base your judgment upon the amount of benefits that ought to be assessed against the railroad? A. No.

Q. And what you undertook to agree to was just to avoid a lawsuit?

A. Yes, that was it. I wanted to keep out of the law if I could.

Q. So far as your judgment as to the benefits, the assessment of benefits made by Mr. Hill and the other assessors, that was right, so far as you know, and believe?

A. Yes. Well, they said this: They assessed the property on a valuation. Here is several tracts of land—

Q. The proposition I want to ask you about is the assessment, that that matter was a proper assessment so far as your judgment is concerned, predicated on the tax book valuation?

A. From the tax books, all the way through.

#### Redirect Examination

Q. You say predicated on the assessment of the property in the district as assessed for general taxation purposes?

A. Yes, that is my understanding.

Q. That was your understanding from Mr. Hill, as to the assessment of benefits in the district?

135 A. Yes.

Q. You stated a moment ago that you thought that was a fair proposition?

Judge Evans: He has never said that.

Q. You stated that I told you other districts had accepted \$84.00 and \$85.00 a mile? A. Yes.

Q. And when I got up to \$250.00 you were ready to take it?

A. Yes, that looked pretty good.

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F. W. GREER, a witness sworn on behalf of the defendant, testified as follows:

#### Direct Examination

Q. Your name is F. W. Greer?

A. Yes sir.

Q. Mr. Greer, you are one of the commissioners of Franklin County Road Improvement District No. 1?

A. I was, yes sir.

Q. Who was serving as commissioner with you at that time?

A. Mr. Conatser and Mr. Wilson.

Q. I now hand you plaintiff's exhibit D which purports to be a proposition or proposal signed by the Commissioners of that District and will ask you if that bears your signature as one of the commissioners?

A. It does, yes sir.

Q. You signed that proposal then?

A. Yes sir.

Q. Did you confer with the other commissioners before doing so?

A. Yes sir.

Q. All of you conferred together?

A. Yes sir.

Q. And you agreed at that time to accept \$250.00 a mile?

A. Yes sir.

Q. And you was Chairman of the Board of Commissioners?  
A. Yes sir.

Q. You say you wanted to avoid any litigation? As a matter of fact, the suit was pending here then against the District?  
A. No.

Q. There had not been any suit filed against you?

A. No, I am pretty certain. I couldn't positively swear that. I see the date we signed that was 1919. I don't think there had been any litigation then at all. Not unless you could show the records. We had had various problems and we wanted to get along with the road if we could without a lawsuit, and we felt like we was getting along very well.

Q. That was signed on the 20th day of November, 1919?

A. Yes.

Q. There had been a suit filed against you then prior to that time?

A. You had filed a suit, you mean?

Q. Yes. A. I don't remember that.

Q. Now if it had been left then to the judgment of yourself and Mr. Jerome Wilson and Mr. Conatser you would have stood by the proposition that you had made?

A. Well, standing by it didn't do any good.

Q. I mean by that you would have had the assessment of benefits on the books of the district changed accordingly?

A. No, we couldn't do that. Mr. Hill told me he would not do that.

Q. I say if it had been left to the judgment of yourself?

A. You see we wasn't assessors; we was the commissioners.

Q. Didn't you make the contracts, all contracts made for the district?

A. Yes, but we didn't do the assessing.

Q. You made contracts though, all the other contracts that had been made with reference to the work on that district?

A. Yes sir.

Q. The Commissioners made the district?

A. Yes.

Q. You have been the sole representative of the district?

A. Yes.

137 Q. As far as litigation is concerned in the court?

A. Yes.

Q. And employing attorneys?

A. Yes sir.

Q. You don't know whether your authority went to the extent of compromising and settling a suit or not? A. No.

Q. So when you got into a lawsuit you had to fight it to a finish.

A. I didn't want to get into a lawsuit if I could help it.

JEROME WILSON, a witness sworn on behalf of the plaintiff, testified as follows:

### Direct Examination

Q. Mr. Wilson, you stated on yesterday that you had signed the proposal marked exhibit D that has been introduced in evidence. Did you confer with the other commissioners before signing it?

A. Oh yes, we was all in conference.

Q. You were all in conference at the time you signed it?

A. Yes sir.

Q. Was there any representative of the railroad present at the time you signed it?

A. Well, you had been there previously.

Q. Who prepared this Mr. Wilson?

A. I couldn't tell you?

Q. And you agreed in that to accept \$250.00 a mile?

A. Yes sir.

### Cross-Examination

Q. Mr. Wilson, you were not one of the assessors of the district?

A. No sir, never had nothing to do with the assessments.

Q. You had nothing to do with the assessment of benefits?

A. No sir.

Q. Who were the assessors of benefits at that time?

A. Mr. Will Hill, J. L. Mosely and Joseph Fisher.

Q. They were not consulted about the assessment of benefits herein?

138 A. No sir, I don't think so.

Q. As far as you know they were not consulted about the assessment of benefits at all? A. No sir.

Q. When the assessment was presented to the assessors of benefits do you know what occurred then?

A. No, only what I heard. I didn't present it myself.

Q. Well, as a matter of fact, when the matter was presented to the assessors of benefits your information was they declined to accept it? A. Certainly.

## Redirect Examination.

Q. Mr. Wilson, as commissioner of the district, did you make the contracts that were made? I mean did the three commissioners make all the contracts made in connection with the work on the road?

A. Yes sir, we made all of the contracts.

Q. You made contracts with the contractors?

A. Yes sir.

Q. And with the Engineers? A. Yes sir.

Q. And with the attorneys? A. Yes sir.

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WILL HILL, a witness sworn on behalf of the plaintiff, testified as follows:

## Direct Examination

By Mr. Pryor:

Q. State your name. A. Will Hill.

Q. Where do you live? A. Ozark, Arkansas.

139 Q. How long have you lived there?

A. I have lived in Ozark fifteen years.

Q. What business are you engaged in?

A. The mercantile business.

Q. In Ozark? A. Yes sir.

Q. Are you engaged in the mercantile business in any way with Mr. M. B. Conatser? A. Yes sir, we are partners.

Q. He was Chairman of the Commission, was he not?

A. Yes sir, that is, back at that time.

Q. Back at that time he was? A. Yes sir.

Q. When the assessments were made in this district you were one of the assessors and who were the other two?

A. Mr. Mosely and Mr. Fisher.

Q. Do you know where Mr. Mosely is?

A. He is here in the court room.

Q. Is Mr. Fisher here? A. No sir.

Q. Mr. Hill, have you the books here of the district?

A. I haven't got them; they may be here.

Q. I will ask you if this is the book showing the assessment of benefits made by the assessors?

A. Well, this is not the original book. This was copied from the original and checked back and found to be correct.

The Court: That was adopted by you as your assessment record?

A. Yes sir.

Q. I will ask you Mr. Hill, to turn to the assessment against the property of the Missouri Pacific Railroad Co.

A. Here it is.

140 Q. What does it show there, you have it divided up into railroad, Missouri Pacific main line?

A. 33 miles main line and 11 miles switches.

Q. Now read the present assessed valuation of road and other property? A. \$711,325.00.

Q. Where do you get that from?

A. We got it from the Tax Assessor's books.

Q. Tax Assessor's books?

A. No sir; the Sheriff's books I believe.

Q. Shows that the Missouri Pacific Railroad Company paid upon the assessment of valuation of \$711,325.00?

A. Yes sir.

Q. What is that? A. Benefits.

Q. Now you was one of the original assessors?

A. Yes.

Q. Now when the property was re-assessed you were not one of the assessors at that time? A. No sir.

Q. Do you know who were the assessors at that time?

A. Mr. Horton and Mr. Morton and Mr. Donald, I believe.

Q. Mr. Hill, I wish you would state to the court by what process you arrived at the assessment of benefits against the property of the Missouri Pacific Railroad?

A. We taken the collectors book as a guide for the valuation of the taxes of the county, and we divided it up in one, two and three, and assessed it at \$25.00, \$20.00 and \$15.00 for the third mile, and assessed according to the valuation of the collector's books. On the farm lands, we was pretty familiar with farm land. Where a man had 80 acres assessed at \$400.00 we raised the assessment to whatever we thought it ought to be taxed at.

Q. But the tax books as shown by the books in the hands of the collector, the assessment for general taxation purposes was the basis upon which the benefits were assessed? A. Yes sir, that was our basis for a guide.

The Court: Mr. Hill, you took the tax books, as I understand, and ascertained what a particular piece of land was assessed at for general tax purposes, State and County?

A. Yes sir.

Q. Now if you conceived that that land was not assessed for those purposes at a sufficient valuation you raised it?

A. Yes sir.

Q. In order to apply the benefits?

A. Made a fair equalization of the assessments as we considered.

Q. Did you lower any of the valuations?

A. Just in a few instances. We found a few tracts that was a little excessive, we thought.

Q. And you lowered that for the purpose of making this assessment? A. Yes, sir, being familiar with the land.

Mr. Pryor: I believe you stated that was the basis for which the assessments were made?

A. We used that as a guide, yes sir.

The Court: The question asked you was whether that was the basis. Now your reply is you used that as a guide. In other words, you started with that valuation?

A. Yes sir.

Q. Now if in your judgment it should be increased for the purpose of making the assessment of benefits you increased it?

A. Yes sir.

Q. And if in your judgment it should be lowered, you lowered it? A. Yes sir.

By Mr. Pryor:

Q. As far as the assessed value of the railroad property was concerned, that was neither lowered or raised?

A. No sir, we took that as shown on the books.

142 The Court: You have stated you divided some property into zones?

A. Yes sir.

Q. Explain that.

A. We had a first, second and third zone. If the property was in a mile of the highway we considered that as the first zone; if it was two miles we considered that the second zone; if it was three miles we considered that the third zone. And we had a few instances where we had a fourth zone. That would reach back into the hills.

Q. What application did you make on that?

A. Ten per cent of the valuation.

Q. What did you do with the first zone?

A. Twenty-five per cent of the valuation.

Q. And on the second? A. Twenty per cent.

Q. And on the third? A. Fifteen per cent.

Q. Now did you make any map upon which you marked out these different zones? A. Yes sir.

Q. Have you got a map of that kind here?

A. I don't know whether it is here or not. I haven't one here. I have it at home.



By Mr. Pryor:

Q. Do you remember what zone the railroad company's property was placed in, the Missouri Pacific Railroad?

A. Now as I remember there is some of it in the first and some in the second zone.

Q. Some in the first zone and some in the second?

A. Yes sir.

Q. The assessment was made upon a per cent?

A. Now I would not be positive. There might have been in one or two instances where the road got away so far  
143 it was in the third. Unless I had the map zones here I would not know.

Q. But the assessment of benefits was made upon the valuation as shown? A. Yes sir.

Q. And that assessment was fixed according to what zone the property was in? Is that correct? A. Yes sir.

Q. Was there any other means adopted by you as assessor for arriving at the benefits that would accrue to the property in the district? A. No sir.

Q. That was the only basis then for the assessment of benefits? A. Yes sir.

Q. Who established the zones?

A. Well, we had a blue print of the improvement District and it showed, we had the sections you know, and we taken the sections and figured it say a mile from the road, and then took the next one, two miles, and so on by the section line of the blue print we had.

Q. Did you do that regardless of the improvements upon the property, or regardless of its location or accessibility to the road? A. Yes sir.

The Court: You took into consideration just the land unimproved?

A. No sir, we took it according to what it was taxed at. Now then, if we knew of a man out here in that first mile zone, say he had eighty acres given in at a thousand dollars. This man has got a good improvement and a good farm that was worth \$1500.00. The next man who had eighty over on the side of the hill, we will say was not worth but \$500.00.

Q. You did take into consideration the improvements?

A. Yes sir. But it would show in taxation on the tax books.

By Mr. Pryor:

Q. That is, you supposed that the Tax Assessor had taken into consideration his improvements? A. Yes sir.

144 Q. And that it was upon that basis that you took the assessment for the purpose of making the assessment of benefits? A. Yes sir.

Q. Now Mr. Hill, from your knowledge of values, farm values generally in Franklin County, do you know what they are assessed at, what per cent of their value for general taxation purposes?

A. I think it would run all the way from 30 to 65 per cent.

Q. Now I believe that you know that the tax assessor has nothing to do with the assessment of the property of the railroad? A. No sir, that is my understanding.

Q. That is assessed by the State Tax Commissioner?

A. Yes sir.

Q. And that you say the value as certified out by the State Tax Commissioner? A. Yes sir.

Q. \$711,325.00? A. Yes sir.

Q. \$711,325.00? A. Yes sir, that is correct.

#### Cross-Examination

By Judge Evans:

Q. The real property of the railroad company then was assessed in the same way that the real property of the other property in the district was assessed for benefits according to the zone that it occupied?

A. Yes, sir, with this exception. We did not change the valuation of any of their property.

Q. But then you adopted the valuation made by the State Tax Commission of the property and did not undertake to make any change with reference to it because you did not have such knowledge?

A. No sir, we taken the railroads, Western Union and those people at what the Tax Commission said the value was.

Q. But in local cases where you knew about it and according to your judgment it was too high or too low, you  
145 put a higher or lower value on it as your judgment dictated? A. Yes sir, that is correct.

Q. Then the percentage applicable to that zone was applied then to that valuation as I understand you?

A. Yes sir.

Q. Well, is it or not true that a great portion of the other real property besides the property of the railroad company in this District was left unchanged by your board of assessors? A. Yes sir, quite a lot of it.

Q. You did not change it every time?

A. Oh no, didn't raise nor lower it if we thought that was about the correct value.

Q. Well, was the greater part of the other property just left like it was? A. I think the majority of it was.

Q. Only in cases where you felt like it was too high or low, that you made any change? A. Yes sir.

Q. That was from your personal knowledge and observation? A. Yes sir.

Q. Were the majority of changes that you made raised or lowered, or do you know?

A. I think there was more of it that was raised than it was that was lowered.

#### Redirect Examination

By Mr. Pryor:

Q. Do you raise, Mr. Hill, all the property that was assessed at 30 per cent of its value, in your judgment, to 50 per cent of its value? A. We tried to.

Q. You don't know whether you succeeded or not?

A. No sir, we tried to the best of our knowledge.

Q. Now as far as the value of the railroad company's property is concerned you got that from the collector's books?

146 A. Yes sir.

Q. You didn't go back to the certificate sent out by the state Tax Commission?

A. No, we taken the collector's book for that.

#### Recross Examination

By Judge Evans.

Q. Now Mr. Hill, did you assisting the board exercise your best judgment and discretion about these assessments an darrive at that in the way you did, and make these assessments believing them to be fair and equitable of the benefits received? A. We did.

Q. Was it your opinion, and is it your opinion that the assessments of benefits made by your board against the property of the railroad Company is just and fair?

A. We thought so.

Q. And for that reason you made it? A. Yes sir.

Q. Believing in your opinion that it would receive that amount of benefits? A. Yes sir.

Q. I will ask you if any proposition was made, proposition of reducing that assessment to \$250.00 a mile, was that put up to you at any time as an assessor, the proposed agree-

ment to reduce the assessment of the railroad property to \$250,000 a mile, was that put up to you?

A. I believe that was called to my attention after they had done it.

Q. Then did you agree to it? A. No sir.

Mr. Pryor: We object to what was done after.

Q. Did you ratify it or agree to it? A. No sir.

Q. Did the assessing board decline to agree to it?

A. They did.

The Court: It is just a question of what effect that will have. The first question will be whether or not the assessors had the power to make that kind of agreement, and whether it was an executed agreement and then whether, if they did not have the power, or if something else was necessary, whether the assessors had that power and whether they ratified it or not. Whatever application it may have, the facts are in and it will be there for that purpose.

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JOHN MOSELY, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

Q. Your name is John Mosely.

A. Yes sir.

Q. Were you one of the assessors in Franklin County Road Improvement District No. 1? A. Yes, sir.

Q. Did you make the assessment against the property in that Road Improvement District? A. I helped do it.

Q. The original assessments? A. Yes sir.

Q. I hand you a book here and ask you if that was the assessment book used by the board of assessors?

A. I don't know that I can state now. I have been away from there nearly three years.

Q. Where are you living now? A. Alma.

Q. Did you live at Ozark at that time? A. Altus.

Q. And you are now living in Crawford County?

A. Yes sir.

Q. I will ask you if you can recognize whether this is the book?

The Court: I guess there is no dispute about the book.

148 Q. I will ask you if you heard the testimony of Mr. Hill? A. Yes sir.

Q. Mr. Hill testified with reference to adopting the valuation basis as the collector's book using the assessment for general taxation purposes. Was that the basis upon which the assessments were made? A. Certainly.

Q. You took a certain per cent of the assessed valuation and extended it as the benefits against that particular piece of property?

The Court: That wasn't the testimony of Mr. Hill.

Q. I mean in some instances raise it and lower it, but as far as the railroad property is concerned you took the assessed value shown on the collector's books? A. Yes sir.

Q. And then you extended a certain per cent of that as the benefits against the property of the Missouri Pacific Railroad? A. Yes sir.

Q. Were you governed as far as the railroad company's property was concerned by the assessed value shown on the tax collector's book? A. Yes sir.

#### Cross-Examination

By Judge Evans:

Q. Mr. Mosely, was it and is it your judgment and opinion that the real property of the railroad company would be benefitted by this highway the amount that you assessed against it as benefits? A. Well, I should believe it was.

Q. That as your opinion and that was why you did it?

A. Yes sir.

Q. And you arrived at the amount in the way you have testified? A. Yes sir.

#### Redirect Examination

By Mr. Pryor:

Q. What was your opinion based upon? What facts were taken into consideration in forming or reaching your conclusion that the property of the railroad would be benefitted?

A. The improvement of the country and the hauling they would get in doing the improvement and buildings, such as that.

Q. You took those facts into consideration that the haulage would be greater if the road was built? A. Yes sir.

Q. Did you take into consideration the fact that it would develop competition by motor trucks?

A. I don't remember whether we did [ot nor].

Q. Did you consider that it would be a disadvantage to the railroad? A. I don't remember.

Q. You don't remember whether you did or not?

A. No; it has been ever since 1919 since we was on that Board and my leaving that county, I simply dismissed it from my mind.

Q. Well, I will ask you Mr. Mosely, if it isn't a fact that you were governed more by the valuation of the property as shown on the collector's books? A. Yes, sir.

Q. Than any other one thing? A. Yes sir.

Q. That is really the basis upon which the assessment of benefits was extended against the property? A. Yes sir.

Q. Was the valuation shown on the collector's books?

A. Yes sir.

Q. I believe it was stated by Mr. Hill you did establish some zones and in one zone the percentage would be greater than it would be in other zones? A. Yes sir.

Q. That was based on the nearness or the distance of the road away from the property? A. Sure.

#### Recross Examination

By Judge Evans:

Q. You took into consideration the development of the country and the increase of haulage by the railroad company?

150 A. Yes sir.

Q. Those are some of the things you did take into consideration in assessing the benefits? A. Yes sir.

#### Redirect Examination

By Mr. Pryor:

Q. Were there any other elements besides those?

A. I don't remember whether there were any other elements considered or not.

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WILL HILL, being recalled, testified as follows:

#### Direct Examination.

Q. Mr. Hill, I will ask you to state, please, what elements were considered by you in reaching the conclusion that the railroad company would be benefitted to the extent as shown on the assessment books?

A. Well, in the first place we knew there would have to be a great deal of gravel hauled to complete that road, and they would get the benefits of that.

Mr. Pryor: We object to that.

A. After the completion of the road we figured that the country would naturally develop more, there would be more

settlements, more people come in and they would have to have material, building material and various things would have to be brought in there from some source.

### Cross-Examination

By Mr. Pryor:

Q. It will have to be brought in there from some source and you believed the railroad company would be benefitted?

A. Yes sir.

Q. And that if they did do some building, that they would be benefitted by hauling the material?

A. Yes; and then people would have to have provisions and stuff, corn, hay and various things.

Q. Was that one of the elements you took into consideration?

A. We had that as a broad conception that a farm would be improved by the benefits put on it, and that the railroad would reap its share of the benefits to the community.

Q. That the railroad would reap its share of the general benefits?

151 A. Yes sir.

Q. Did you consider that it would develop competition for the railroad at that time?

A. I don't think we did.

Q. You didn't think what effect the construction of this improved highway would have upon the traffic of the railroad? A. No sir.

Q. Now the only basis outside of the valuation basis that you have named before, is the fact of the general benefit it will be to the community at large? A. Yes sir.

Q. And you thought that the railroad company should pay on the value of the assessment of its property for general taxation? A. According to the other property.

### Redirect Examination

By Judge Evans:

Q. Did you take into consideration the real benefits on the other property in the district including the railroad, that the country would develop and more people move in, more things would be produced and that the general prosperity would give more business to the railroad? A. Yes sir.

Q. And that it would be benefitted actually by the increase or the prosperity of the country in its actual business of carrying freight or passengers?

A. Yes sir, that is what we considered.

Q. That is what you meant when you answered Mr. Pryor about taking into consideration the general benefits to the country? A. Yes sir.

Q. Do you know anything personally about the increase of the business of the railroad at Ozark, or at any point along there, by reason of the construction of this highway, or since the construction of the highway, if not by reason of it? Do you know personally about that?

A. I don't believe I quite understand the question.

152 Q. Have you any personal knowledge of the amount of business done by the railroad at Ozark, or at any point since the construction of the highway?

A. Nothing more than observation.

Q. From your observation what could you say about it?

A. There seems to be more stuff coming to our town than has heretofore, more food stuff, more building material.

Q. How does that get there?

A. All the through stuff comes by railroad. There may be some local stuff comes in there by motor trucks.

Q. Are you in business there? A. Yes sir.

Q. Is it your observation that the railroad company does more business, shipping?

A. It seems to me like there is more stuff being used.

Q. Do you know about the shipping out of stuff?

A. Well, I don't know. I couldn't say.

Q. Do you know anything about whether the railroad company has increased its property, the landed property since the completion of the road?

A. Well, they ask more for that land they own.

Q. They do? A. Yes, sir.

Q. Do you know how much they have put on, the increase in the land?

A. I bought a piece of land from them three or four years ago and gave seven dollars an acre for it. I bought a piece 30 days ago and paid nine dollars for it.

Q. For the same kind of land?

A. I don't think it was as good as the first I bought; it cost me more money but wasn't as good land.

Q. Do you know anything about whether the railroad company is making an effort to have fruits, vegetables and other farm products increased so as to increase the business of the railroad company?

153 A. You mean whether the farmers are doing this?

Q. Whether the railroad company is taking any interest in getting the farmers to?

A. I don't know; they may have had some agents in there. I do know that Mr. Conatser and I have put out a good orchard out on the pike. If it had not been in there we would not have put it out.



Q. And that when it comes in, the fruit will have to be shipped by the Missouri Pacific Railroad?

A. Yes sir.

Q. By reason of having this pike to get it to the station?

A. Yes sir.

Q. Do you know whether other people are doing the same thing?

A. Yes sir, there is several now ready by reason of the fact that this pike has been constructed.

Q. And they can get to the railroad station with their stuff and ship it abroad?

A. Yes sir; we had a very bad road until this pike was put through the county.

#### Recross Examination

By Mr. Pryor:

Mr. Hill, you suggested a moment ago about the railroad lands. The railroad lands was not included in this assessment?

A. Where they are in the district they are.

Q. They are assessed independently of the mileage and roadway of the railroad?

A. Yes sir.

Q. The assessment of benefits certified by the,—I mean the assessment for general taxation purposes except the real estate, that is assessed by the assessor?

A. As I understand.

Q. And there was never any objection, was there, by the railroad company to the assessment on its land?

A. I never heard of any.

Q. The only objection was to the assessment of benefits extended against the main line property?

154 A. That is all I heard of.

Q. Now you stated about people putting out,—you put out 20 acres in peach orchard?

A. Yes sir.

Q. How far is that from the town of Ozark?

A. Two miles.

Q. You could have put that out before, could you not?

A. Yes sir.

Q. They have orchards a greater distance than that from Ozark? A. Oh yes.

Q. How many miles do you know of the farthest away where they market at Ozark?

A. I guess eight to ten miles.

Q. And they have been there for years?

A. Well, yes, I guess some orchards there are six or eight years old.

Q. So the good road does not cause any more peaches to grow on the trees?

A. When this good road agitation started the people [begin] to put out orchards.

Q. I mean years before?

A. There wasn't much fruit shipped from Ozark.

Q. Do you know how many people have moved into Franklin County on account of the construction of this road?

A. I do not.

Q. You stated that it looked like the railroad is getting more traffic. That is merely a guess?

A. That is my observation.

Q. You have never checked it up to determine?

A. I have never asked the agent any questions.

#### Redirect Examination

By Judge Evans:

Q. You have been asked specifically about the assessment of town property. You state generally the valuation of the property with improvements on it, did that apply to  
155 town property also?

A. Yes sir.

Q. For instance, a business house in Ozark or Altus valued on the tax books at \$1800, if you thought it was too much or too little, you adjusted it in the same manner as farm property? A. Yes sir.

Q. And you took it for granted the improvements were taken into consideration in the towns?

A. In town the improvements were all together because the lot would have been of very little value.

#### Recross Examination

By Mr. Pryor:

Q. Mr. Hill, what element figured the more largely in considering the benefits that would accrue to the railroad property? The valuation as shown on the collector's books or the general benefit which would accrue to the community at large?

A. Now I don't recall that we discussed that.

Q. Well, I will ask you if the particular basis for that assessment was the amount shown on the collector's books?

A. Yes sir.

Q. Then these other matters or elements that you say were considered were merely secondary in importance?

A. We figured that the railroad would be benefitted as well as the country at large.

Q. The railroad would receive the same benefit that the community at large would receive, the community benefit?

A. Yes sir.

The Court: You referred to two purchases of land made by you from the railroad. Now that land was a part of the original grant that was made by Congress to the railroad?

A. Yes sir.

Q. And that land has been sold from time to time by the Land Department of the Railroad, has it not?

A. Yes sir.

Q. And not in any way connected with the transportation department?

156 A. My understanding is that it is not.

By Mr. Pryor:

Q. You state that you bought that first forty acres how long ago?

A. I think some four or five years ago.

Q. And you paid for that how much?

A. Seven dollars.

Q. And you bought some more how long ago?

A. About thirty days.

Q. And you paid \$9.00 for that. That was an increase of \$2.00? A. Yes sir.

Q. I will ask you if farm lands over the country have not increased in that same proportion?

A. Yes sir.

Q. Franklin County and elsewhere?

A. I couldn't say about elsewhere; it has in Franklin County.

Q. Well, outside of the road district it has?

A. Practically all over the country about the same.

#### Recross Examination

By Judge Evans:

Q. The Peoples Bank Building in Ozark, do you remember what that was assessed at on the tax books for general taxation?

A. Well, I don't know that I could say. I could by referring to the book.

Q. Just to refresh your memory I will ask you if it wasn't assessed at \$1800.00 and you raised it to \$2400.00?

A. I think it was assessed higher than that as I remember.

ED B. MELTON, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination

Q. Your name is Ed B. Melton?

A. Yes sir.

Q. Where do you live?

A. Ozark, Franklin County, Arkansas.

157 Q. How long have you lived in Franklin County?

A. Sixty-one years the 23rd day of last September.

Q. Have you held any official positions in Franklin County?

A. Yes sir, I was sheriff six years.

Q. Mr. Melton, are you one of the assessors of Franklin County Road Improvement District No. 1?

A. Yes sir.

Q. You are now one of the commissioners for the Franklin County Road Improvement District No. 1?

A. Yes sir.

Q. You did not make the original assessment?

A. No sir.

Q. You were not an assessor at that time?

A. No sir.

Q. Mr. Melton, I believe you did make a re-assessment of the property, did you not?

A. Yes sir.

Q. It appears upon the book, assessment of benefits in which the assessment of benefits has been sustained, that the property of the railroad company was assessed \$54,062.00. That was increased to \$75,686.00?

A. Forty per cent, that is what we figured it all.

Q. Did you do that irrespective of any benefits that accrued to the property?

A. The Commissioners said they had to have about forty per cent increase in taxes to finish the road.

Q. They had to have the money?

A. We put the forty per cent on everything.

Q. You put a blanket figure of forty per cent on everything?

A. Well, with about four or five exceptions; some land out in the country we knew of we didn't add the forty per cent. It was too much anyway and we didn't do it. With that exception we added forty per cent on everything.

158 Q. What did you consider? What elements were considered by you figures in the assessment of benefits?

What elements were considered by you or the Board of Assessors?

A. We just put on forty per cent, that is all.

Q. Well, you didn't consider any elements then at all as far as any benefits were concerned?

A. Just the commissioners said they had to raise so much money and it would take forty per cent, enough to finish the road, and with four or five exceptions we just added forty per cent. Some poor land back in the county we didn't add forty per cent.

Q. How many tracts of that land that you didn't add 40 per cent?

A. I can't recall exactly; I think there was about four or five.

Q. Small tracts of land?

A. Yes sir.

Q. But as far as the railroad was concerned you didn't consider whether the railroad would be benefitted or damaged, or take into consideration any elements at all with reference to that, you merely made an increase of forty per cent?

A. Yes sir.

Q. And you extended it on the assessment book?

A. Yes sir, on everything.

Q. Who were the other assessors with you?

A. J. T. Donald and Charley Horton.

Q. Are they here now?

A. Yes sir.

The Court: Does it show on the assessment book, the date that this additional assessment was put upon the property?

A. I suppose the date will show on our report to the Commission.

The Court: But it doesn't show on the book?

A. No sir, we made a report to the commissioners.

Q. Have you the report here?

A. I don't know whether they have got the report or not.

Q. This shows by the certificate of the commissioners here that the benefits were reassessed and filed on the 20th day of October 1921?

A. I don't remember the date, but it was in the fall of 1921. I guess it is correct.

Q. Mr. Melton, this report made with the extension of 40 per cent increase in the assessment of benefits was filed by you and the other assessors with the commissioners of the district, were they not?

A. Yes sir.

Q. And submitted to them for their approval?

A. Yes sir, we filed it with them.

Q. And that assessment was made in the way you have stated to the court?

A. Yes sir.

The Court: You referred to a report. Do you want to introduce that?

Mr. Pryor: I wanted to introduce that by Mr. Jerome Wilson.

### Recross Examination

Mr. Melton, what is your present occupation?

A. I am working for the Missouri Pacific Railway Company.

Q. In what capacity are you working for the Missouri Pacific? A. Looking after the land.

Q. What is the extent of your territory?

A. Well, I haven't got any special territory. I go anywhere in the land grant they send me.

Q. In Arkansas?

A. Yes sir. The majority of the time I work in Franklin County, Crawford, Johnson and Logan.

Q. How long have you been engaged in that business?

A. Sixteen years.

160 Q. Have you been engaged in that constantly practically since you went out of the sheriff's office?

A. Yes, sir; except four months.

Q. Mr. Melton, at the time you became assessor of the benefits for the District you took an oath as assessor to perform the duties of the office faithfully and to the best of your ability? A. Sure.

Q. Now then you have stated that the Commissioners told you that it would require 40 per cent more than the original assessment of benefits to complete the road. Now did you as one of the assessors consider that the property that you assessed forty per cent would be benefitted the amount of 40 per cent of the original assessments?

A. I suppose so.

Q. Was that your opinion?

A. In some cases they would benefit; in some it would not. We had to raise the money.

Q. I understood you took an oath to assess it according to the benefits it would receive?

A. If it had not we would not have put it on.

Q. If you did not think the property of the Missouri Pacific would be benefitted more than the original assessment of benefits, why did you put it on?

A. Sure, it would benefit them as much as the land owners we considered.

Q. You say your opinion as an assessor and official of the District acting under your oath, was and is that the railroad property and other property to which you added an assessment of forty per cent to the original benefits as benefits to accrue to the road. That is what you actually believed was the fact? A. Yes sir.

Q. There was nothing to prevent you from acting according to your judgment and your oath in that respect? A. Forty per cent.

Q. As a matter of fact, the commissioners told you that it would require 40 per cent more than the original assessment to complete the road?

A. Yes sir.

Q. And that they needed more money?

A. Yes sir.

Q. And as a matter of fact then, in your judgment as an officer sworn, the property would be benefitted the amount of forty per cent. Isn't that a fact?

A. We put it on.

Q. Was it your opinion and belief that it would be benefitted forty per cent?

A. Some of it would and some wasn't.

Q. Why did you put it on that that wasn't.

A. We had to have the money.

Q. You took an oath to assess according to the benefits it would receive?

A. There is some real estate in the county that wasn't benefitted but we had to have the money.

Q. Some of the real estate in the district you did not think would receive 40 per cent and you didn't put it on that?

A. About five tracts.

Q. But all the rest that would be benefitted as much as 40 per cent of the original assessment?

A. Some of it was, yes.

Q. You excepted five tracts that you thought would not be benefitted forty per cent?

A. Well, they didn't anybody come in and object.

Q. Were you acting under oath to do according to the law and facts required?

A. Yes sir.

162 Q. Did anybody object to these four or five tracts?

A. Yes sir, Mr. McKinney, Mr. Cazine, Clay McIlroy.

Q. Now then as to the benefits 40 per cent added to the original assessment of benefits of the railroad property, I be-

lieve you stated that in your opinion it would be benefitted by the completion of the road that amount?

A. Yes, and quite a number of ways would be benefitted.

Q. You think the railroad and quite a number of others would be benefitted that way?

A. Yes sir, I think so.

Q. So there wasn't any want of benefits on the part of the railroad company, to the railroad company, as far as the 40 per cent was concerned in your judgment?

A. How was that, Judge?

Q. You say you didn't put anything against the property of the railroad as benefits that you didn't honestly think ought to go there?

A. No, we didn't. Mr. Miles was with us.

Q. Mr. Miles represented the railroad company there and you heard what he had to say?

A. Yes sir.

Q. And after having heard whatever was to be said then you as a member of the board, and the other two you spoke of, assessed the benefit of forty per cent, acting on your judgment that it would receive that much benefit?

A. Yes sir.

#### Redirect Examination

By Mr. Pryor.

Q. Mr. Melton, Mr. Miles was there protesting against any increase in assessments against the Missouri Pacific property?

A. Yes sir.

Q. You were asked the question about representing the Land Department of the Missouri Pacific in Franklin County? A. Yes sir.

Q. What company is that?

A. Missouri Pacific.

Q. Is it the Little Rock & Fort Smith Railway?

A. No sir; the Missouri Pacific.

Q. Is that separate and distinct from the operating department of the railroad?

A. I think so; I don't know for sure. Mr. Phillips is the Railroad Land Commissioner. I don't think it has any connection with the rolling stock.

Q. Mr. Melton, I believe you stated on direct examination, as well as the cross examination, that in making these increases in assessment of benefits you merely had to raise the property forty per cent?

Judge Evans: I have cross examined on the question he presented. I object to any restatement of it.



The Court: I understand that the one side emphasizes the fact that it was necessary to raise more money, and the other side emphasizes the fact that it was made according to benefits. Now you can just bandy that proposition back and forth the rest of the day and you won't get any further with it.

By Mr. Pryor:

Q. On cross examination you stated that in your honest opinion the railroad would be benefitted to the extent of forty per cent increase in assessment of benefits that had been originally made?

A. The same as to the land owners.

Q. Did you look to see what the assessment of benefits against the Missouri Pacific, or of the other land owners in that district had been assessed?

A. It was there before us.

Q. Did you examine it with reference to the particular  
164 tracts except where it was called to your attention?

A. Mr. Donald done the figuring and the writing and I went over the books to see each forty was correct.

Q. You had agreed on forty per cent that it would require 40 per cent increase?

A. That was the instructions from the commissioners.

Q. That was the instructions from the Commissioners that you had to assess the benefits 40 per cent, and therefore, you had nothing left for you to do as far as the effect of building the road would have upon any part of the land?

A. It would benefit only the same as the other.

Q. And you increased it accordingly?

A. Yes sir.

The Court: You say that you got instructions from the Commissioners?

A. Yes sir.

The Court: What were those instructions?

A. They had to raise the property in the road district 40 per cent more in order to get more money to complete the road.

Q. Was that in writing?

A. No sir, that was verbal. There was a letter read there from Rose & Rose, but I don't remember what they said about it. One of the commissioners was present, and Dave Partain when we met.

## Recross Examination

By Judge Evans:

Q. You mean you received information. They didn't tell you what to do, did they? They told you that they needed 40 per cent more money, would have to have that to build the road and you gentlemen were assessors to determine whether or not the property would be benefitted the forty per cent?

A. That was the instructions we had.

Q. When you looked into it you came to the conclusion that it would be benefitted that much of the original assessment by the building of the road?

165 A. Some of it would and some of it would not.

Q. But the railroad property would be benefitted 40 per cent? You have stated that?

A. Yes sir, but there is some of the real estate that would not.

## Redirect Examination

By Mr. Pryor:

Q. Who were the commissioners at that time?

A. Jerome Wilson and Mr. Prothero and Whit Martin.

Q. Was Mr. Mellroy connected with it in any way at that time? A. No sir.

Q. He was out at the time the increase was made?

A. Yes, sir. Mr. Prothero had taken Mr. Mellroy's place I think.

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HUGH R. CARTER, a witness sworn on behalf of the defendant, testified as follows:

## Direct Examination

By Judge Evans:

Q. Mr. Carter, Hugh R. Carter is your name?

A. Yes, sir.

Q. What is your occupation?

A. Civil engineer specializing in highways, paving and drainage.

Q. How long have you been engaged in that business?

A. Since my graduation from the University of Arkansas in 1907.

Q. Did you at any time occupy the position of State Highway Engineer for the State of Arkansas?

A. Yes, sir, I was State Highway Engineer for the State of Arkansas from about May 1913 until about February 3rd or 4th, 1919, and acting until March 31st.

Q. Mr. Carter, during that time were you in the army service as an engineer?

A. Yes, sir, I was a Captain in charge of Highway work at Camp Knox, Ky., from August 1918 until December 2, 1918.

166 Q. During your service as civil engineer have you had any employment or relation to employment as to building of highways in any special county?

A. Yes sir, I was County Highway Engineer in Pulaski County for two and a half years, and County Highway Engineer for Bowie County, Texas, prior to that time. Texarkana is the largest town.

Q. Since your connection with the State Highway Department what have you been engaged in?

A. I have been in private contracting as a member of the firm of Carter & Knox until Professor Knox's death. Since that time I have conducted the business by myself.

Q. Were you not, an engineer for the construction of the Road Improvement District No. 1, the one under review?

A. Yes sir.

Q. Do you remember in the beginning of that construction, that is, when the construction of the improvement started?

A. I can't give you the exact date but it was in the late spring or early summer of 1919.

Q. Has the road been completed?

A. Yes sir, it has been completed.

Q. Do you know what the length of the road is?

A. It is a little under 24 miles.

Q. There has something been said about the character of the road. What is the character of the road that has been constructed. Please state briefly to the court.

A. It is a road on which all drainage structures are either concrete or galvanized iron pipe, and all bridges steel, on which the grade does not exceed 7 per cent, and the surface is constructed of a stone base covered by a gravel surface four inches in thickness computed on the stone base. The gravel used was shipped in from Benton, Arkansas over the Missouri Pacific.

Q. Do you know how much of that gravel it required?

A. Yes, sir.

167 Q. How much?

Mr. Pryor: We desire to object to the amount of gravel it required to complete the construction of the road and especially if it is introduced for the purpose of showing any revenue derived by the railroad company from that character of traffic, as the benefits contemplated only those that accrued after the completion of the highway.

The Court: The testimony may go in subject to your objection to be ruled upon at the submission of the case finally. I do this in order to allow the theory of both sides to go into the record. I understand that the contention of the railroad company and its attorneys will be that no benefit in the way of additional tonnage on account of material hauled that went into the construction of the road should be considered. That may be the final conclusion that the court will arrive at, but at any rate I think it should be allowed to go into the record so it can be considered, as to whether that was a proper element.

A. The gravel shipped in was 53,674.5 tons.

Q. What other materials were shipped in, do you know?

A. I haven't a correct statement but there was approximately five cars of cement and all of the contractor's equipment, and about six cars of steel for bridges and various and sundry items that I would say would amount to perhaps five additional cars.

Q. In leaving the proposition I was asking about when we got to this matter, this gravel was shipped in from Benton, Arkansas and was used in surfacing the road from the eastern to the Western side? A. Yes sir.

Q. And was all carried over the Missouri Pacific Railroad from Benton, Arkansas, to the point here where it was received and used? A. Yes sir.

168 Q. And freight paid on it from Benton, Arkansas to the place where it is consigned to? A. Yes sir.

Q. Now Mr. Carter, have you had employment in a number of instances in the building of highways near to or paralleling railroads?

A. I suppose since 1919 since going into private practice that I have constructed at least 250 miles that paralleled more or less railway lines.

Q. Please state what in your opinion will be the effect or is the effect upon the real property of the plaintiff, the Missouri Pacific Railroad Company, by the construction of this highway, the improved highway and road improvement district in Franklin County, Arkansas?

Mr. Pryor: We desire to object, Your Honor, on the ground that this witness has not shown himself qualified to express an opinion as to what effect it would have upon the property of the railroad company, or upon its traffic. Its value is based entirely upon the traffic that passes over the

road. He has not shown any connection with the railroad company or the traffic department.

The Court: I think you can bring that out on cross-examination and that will go to the weight of his testimony. It is simply a matter of opinion on the part of Mr. Carter, and it is also in the nature of the provision with reference to what is going to occur in the future. With reference to all except this perhaps he should have had actual experience in this matter. The objection will have to be overruled.

Mr. Pryor: Exception.

A. In my opinion the Railway Company will be greatly benefited by reason of the construction of this highway because it will develop the community or Franklin County by inducing other people to come in and settle up this country and more intensely cultivate it, which as a natural result the tonnage from Franklin County in this road district would be hauled by the Railroad Company. I have in my mind one particular case where a few tax payers at Mulberry or rather this side of it in Franklin County near Mulberry, and in this Road District some months ago enjoined, or rather asked the Chancery Court for the appointment of a receiver to complete this particular road, and their reasons being that—

Mr. Pryor: We object to that, if Your Honor please.

The Court: The trouble about that is that that is simply repeating the reasons that those people assigned for some particular measure that they had in view. Now I rather think that is a little wide.

Q. You needn't state that, Mr. Carter.

The Court: It probably would be a matter for cross-examination to this extent, say, asking him what he based his opinion, if the interloer sees fit to go into that particular point, but I doubt whether all these matters would be competent in examination in chief.

Judge Evans: He is undertaking to state the various considerations that he takes into consideration. I thought it was competent for him to state that as one of his opinions.

The Court: Well, he may answer.

Mr. Pryor: We desire to save an exception.

The Court: Is the objection made on the ground that the proceedings themselves would be the best evidence?

Mr. Pryor: Yes sir.

The Court: Objection sustained on that ground.

Judge Evans: We desire to save an exception.

Q. Any other reasons now that you base your opinion on?

170 A. In this particular district there is a considerable acreage of land that is only adaptable to the raising of fruits and small berries, strawberries and things of that sort, and a section that cannot be developed into a buying one without improved highways in there. All these businesses can be developed properly, for instance, where strawberries coming from Washington County where a great many strawberries are raised, I am familiar with that particular phase of it. Where strawberries are hauled over a bad road, a road like say in Franklin County before this road was improved, there is a great wastage by reason of jolts and delayed transportation from the farm to the railroad point. That is now passing; that can only be developed in a community having good highways and it is a business that means direct tonnage to the railroad, because in raising these berries to make it profitable they must be raised on a scale larger than could be consumed by the local community, and in this particular case another phase is the topographic conditions over which this road runs. It eliminates about four very bad hills. In other words, it goes over the road and follows the rough topography. Now the roads leading into that can be cheaply maintained. Then there is a great timber industry that can be developed just north of this highway which is now being developed, in fact, there is a little lumber mill now shipped out there that was never there before because from the point of intersection of this road to Ozark was impossible for hauling this particular tonnage. Another reason I think it will benefit the railroad is because of the fact that it will develop tourist traffic if in some future time a complete system of highways is connected up. The statistics of the Bureau of Public Roads show that one out of every five tourists invests something in a country through which they go, and considering all of these conditions it is my opinion that the railroad company would be very greatly benefited.

171 Q. Do you know whether or not, Mr. Carter, the road in Johnson County that has been spoken of in evidence, whether that has been completed or not.

A. It has not been completed and cannot be completed without additional legislation.

Q. So there is no connecting highway on the east, with this highway? A. There is not.

Q. Is there any connecting highway on the west?

A. There is none and at times the road from Franklin County through Crawford county to Van Buren is practically impassable.

Q. Now as a man engaged in the construction of these public improvements, I understand it to be your idea that in the construction of these improvements, gradually the roads in sections of the country will be improved and that will develop the country to a very great extent and it will necessarily benefit the railroad to that extent? A. Absolutely.

Q. And the final result of it all is that this we have in mind in benefits to farm property or to railroad property, that it is the increase of prosperity in the country that increases the business in the country, and therefore, increases the value of the real property?

A. Yes, sir; if that were not true there would be no incentive to develop any country.

Q. Now Mr. Carter, have you the figures there taken from the tax record which we have here, so we can get it in so many words, the amount of taxable property in this district.

A. Including the railroad company \$1,754,052.00.

172 Q. And what is the amount of the railroad company's property as shown by the books for assessment generally? A. \$711,325.00.

Q. Now will you state what percentage of the real property in the district the property of the railroad company is?

A. The percent as shown by the tax books for state and county purposes is 42.1 per cent of the total property in the district, as assessed for state and county purposes on railroad property.

Q. Now then what is the total amount of benefits assessed against the real property?

A. The total amount of benefits assessed including the railway property is \$575,431.25.

Q. What is the amount of assessed benefits ordered against the railroad company on the reassessment? A. \$75,686.00.

Q. What per cent of the assessment of benefits is assessed against the railroad company?

A. Only  $13\frac{3}{4}$  per cent.

Q. Mr. Carter, from the time of the making of the first assessment of benefits until the re-assessment were any changes made in the plans of the road, or building of the road so as to necessitate greater expenditure, and therefore to increase the benefits of the road, please state what they were.



A. Yes sir, there was, and I expect Judge, it would be better to take the project from its inception down to the present.

Q. All right.

A. Originally the construction cost without considering overhead was estimated at 261 or 2 thousand dollars. Including overhead would run it to 294 or 5 thousand dollars. At the time the first assessment was made it was expected that the board would receive in state and Federal aid \$175,000.00. After that had been done it developed that at that time the Bureau of Public Roads or the Federal Government regulations have changed in the meantime requiring a different type of construction. For instance, they required fifteen foot surface on this road in place of only 12 when we had first originally surveyed it. A requirement was to reduce the maximum grade from 9½ per cent as we had planned down to a maximum of a little over 7 per cent. Those changes materially increases the cost and in addition, it developed that on the Altus hill after the road had been constructed up this hill along the old road that they required a cut off for through traffic which would have the maximum grade of 5½ per cent. That work cost \$43,000, so in making all these changes and in meeting these requirements the total cost including overhead ran up to a little over \$400,000.00.

Q. Did those changes you have spoken of also increase the benefits to the property generally?

A. Absolutely, because it reduced the grades; that made it possible to haul over the road.

Q. Did it increase the benefits to the property in the district fully as much more than the additional assessment made?

A. Oh yes.

Q. Now what about the extending the width of the road from 12 to 15 feet?

A. That was to meet a requirement of the Federal Government, and also some tax payers in the District.

Q. That is the top?

A. Both the gravel and the stone base. In other words, the width of surface was increased 25 per cent.

Q. Now it has a stone base throughout the entire length of the road? A. Yes sir.

Q. And it has a gravel surface throughout the entire length of the road? A. Yes sir.

Q. When was that road completed?

A. It was finally completed about January 1st of this year.

Q. Has it been accepted by the Federal Government?

A. It has.



Cross-Examination

By Mr. Pryor:

Q. Mr. Carter, you state that you are state highway engineer?

174 A. Yes sir.

Q. For how long?

A. For approximately six years.

Q. And that you were also State Highway Engineer for Pulaski County.

A. No sir, I was County Highway Engineer.

Q. What years were you county Highway Engineer for Pulaski County?

A. I went from the County Highway Engineer's office.

Q. As I understood you to say, that the original estimate of cost of the building of this road was \$175,000.00?

A. No sir; I stated the original estimate was 261 or 2 thousand dollars.

Q. And that it finally cost \$400,000.00?

A. Yes sir; that is including overhead. The total cost was increased around \$105,000.00.

Q. How much was the cost of the change in the road that you have referred to reducing the grade?

A. The cost was \$43,000.00. To widen the gravel surface cost us round numbers \$35,000.00 and the increased drainage or rather rebuilding and repairing some bridges that we had to take care of, the rest of it.

Q. What was the length in the change to meet the grade?

A. The longest particular point was around 3600 feet. That is on the Altus hill, but it was solid rock work and a very difficult piece of work to do, and very heavy work.

Q. You were the engineer for the district?

A. Yes sir.

Q. When did you become the engineer of the district?

A. I think in April, 1919.

Q. You haven't a copy of your contract with the district with you? A. No sir.

Q. Wasn't it before March 31, 1919?

A. I don't think so.

Q. You were the State Highway Engineer at the time the act of the Legislature was passed creating this road improvement district.

175 A. Yes sir.

Q. Did you assist any in the preparation of that act?

A. Did not, no sir.

Q. Were you employed by the District at the time you were State Highway Engineer? A. I think not.

Q. Don't you know?

A. As a matter of fact my brother was employed by this district.

Q. As a matter of fact, does not the oath that you took as State Highway Engineer prohibit you from being directly or indirectly interested in any Road Improvement District?

A. I don't think so myself.

Q. You are the same H. R. Carter, are you not, that was the engineer for the Sebastian County Road Improvement District? A. Yes sir, same one.

Q. You entered into a contract with the Sebastian County Road Improvement District, did you not, while you were the state Highway Engineer? A. Yes sir.

Q. You did that and that was contrary to the oath that you had taken? A. No sir; not in my opinion.

Q. But in the opinion of the Supreme Court?

Judge Evans: We don't think that has anything to do with this matter here.

Q. Your fees in regard to this are upon a commission basis, are they in all Road Improvement Districts?

A. Not in all.

Q. I mean in this particular one?

A. Yes sir, that is correct.

Q. What was the basis of your fees in that district?

A. It was a five per cent contract.

Q. That was five per cent on the total amount of the cost?

176 A. No sir; of the construction cost only.

Q. Well, you were interested then, if it cost \$400,000.00 the construction cost to complete the road, you received a larger fee than if it cost \$200,000.00?

A. Certainly. Just the same as you would receive a larger fee for a big lawsuit, than you did for a small one.

Q. So in making the estimates as a rule the actual cost of construction exceeds the estimates made by you?

A. Not me; no sir. There has not been a single road district or any other improvement on which I have been engineer that my construction costs, the final construction costs have exceeded my estimated cost, unless the Boards have changed the plans, more than five per cent.

Q. It is usual for Boards to make changes in plans?

A. Some districts they do and some districts we have made no changes at all.

Q. Are you the same Hugh R. Carter that had a suit against Franklin County?

A. Yes sir, I have had several lawsuits.

Judge Evans: I can't see what relation that has to this matter. We object, if Your Honor please, because it can't make any difference because of litigation or lack of litigation can't effect any question that is material here. We can't go into those theories. Those things are things that were thrashed out in those cases and have no materiality or competency here.

Mr. Pryor: My further contention is this, that it is a matter that tends to reflect upon his credibility as a witness, where he has estimated as State Highway Engineer, he has made those contracts in violation of his oath of office.

The Court: He has already answered that. He said he entered into those contracts and he gave it as his opinion that it was not in violation of the statute. That is about as far as you can go. If as a matter of law it is a violation, you  
177 may make that contention. The point is that it [—] not a matter that is material to the issues in this case.

Mr. Pryor: Except for the purpose of showing the monetary interest this witness has.

The Court: I don't think it is competent. I think it goes into a field that gives us no light in this particular matter.

Q. Mr. Carter, just for the purpose of identification, you are the same Hugh R. Carter involved in the case of Franklin County Road Improvement District—

Judge Evans: We object. That is the same objection I objected to awhile ago.

The Court: He may answer that question.

A. Yes sir.

Q. Decided October 16, 1922? A. (No answer).

Q. Mr. Carter, what experience have you had in railroading? A. I have had none in railroading.

Q. You don't know anything about the traffic of a railroad?

A. Nothing more than what I can see.

Q. You don't know what traffic is profitable, or what traffic is unprofitable to a railroad?

A. The only way I could answer that question would be to state that I can't imagine any traffic that would not be profitable.

Q. And that is your basis for the statement of your opinion that there was a profit in handling the gravel from Benton?

A. I might state this: That your railroad had orders from the Interstate Commerce Commission to return all empty cars to coal mines that this District secured permission to load those cars at Benton. Had you not hauled this gravel and received the freight on this gravel, your cars would have run to the coal mines without any freight, and I considered that profitable.

Q. You consider it profitable regardless of what the traffic rate was on gravel?

178 A. I don't imagine that they are hauling it without profit.

Q. Don't you know as a matter of fact that the tariff is fixed by the Interstate Commerce Commission and fixed by the Railroad of Arkansas.

A. I don't think so. They attempt to.

Q. What experience have you had with the Railroad Commission? A. Nothing more than any other.

Q. What connection have you ever had with the Interstate Commerce Commission?

A. Nothing more than my profession required.

Q. To what extent does your profession require you to become acquainted with the actions of the Interstate Commerce Commission? A. To determine freight rates.

Q. Do you know what principle or reasoning is adopted by the Commission in fixing the tariff rate?

A. I don't attempt to know.

Q. You don't know?

A. I say relative to my profession.

Q. You say that you have built 250 miles of road in Arkansas? A. Yes sir.

Q. Where is that 250 miles of road?

A. There is approximately 24 miles in Franklin County. There is 165 miles in Arkansas County; there is around 115 miles in Dallas County, and around 40 miles in Pulaski County; in Lonoke County 26 miles; in Mississippi County 97 miles, of completed roads and those under construction.

Q. I mean completed roads?

A. I can give you 24 miles in Franklin County. 165 miles in Arkansas County, of that amount there is about 95 miles of the road completed. And Dallas County there is about 65 miles completed.

Q. What was the cost approximately of that road?

A. The Arkansas road work completed to date was \$2,900,000.00. Franklin County, \$400,000.00; Dallas County \$600,000.00; Lonoke County about \$400,000.00; 179 Pulaski County about \$450,000.

Q. That is approximately \$4,750,000.00 of roads. Your commission you say on the cost of construction is five per cent. Is that the commission in every district?

A. I don't think that has anything to do with this case.

Q. With those Districts is that the commission you received? A. Not in all cases.

Q. In the majority of cases.

A. But if you are going into that phase of it, then I ought to be permitted to submit the expenses that I have been put to on those districts.

Q. I am just asking you if your commission was five per cent?

A. The gross commission, yes. I said approximately.

Q. You believe that roads are a great benefit to the country, do you not? A. Yes sir.

Q. You say that this 250 miles of highways parallels railroads?

A. I didn't say this 250 miles. I said I was engineer on districts that would parallel railroads 250 miles.

Q. And you believe in your opinion, as I understood you that the building of a highway paralleling the railroad would be a great benefit to the railroad? A. I do, yes, sir.

Q. Would be of great benefit to the railroad? A. I do.

Q. In reaching that conclusion are you governed by the commission that you receive on the cost of construction, or upon the actual benefit that the railroad company received?

A. I stated to you that it was my opinion that the railroad company would be greatly benefited.

Q. In reaching that conclusion did you take into consideration the loss of traffic by motor vehicle running over the highway?

180 A. I do to this extent; That it is not necessary, the highway isn't the main competitor you have. It is the development of the motor trucks. The motor truck is the real competitor of your railroad and not improved highways so much.

Q. Does the building of improved highways paralleling the railroad facilitate the operation of the motor truck?

A. The motor truck can run on the dirt road.

Q. During the rainy season?

A. Well, there is two or three months in the year that they can't.

Q. But the hard surface road as you have constructed in Franklin County, a truck can run there over that at any season of the year, regardless of rain or any other weather conditions? A. Oh, yes.

Q. That is an all year round road for motor trucks or automobiles? A. Yes sir.

Q. And that is true of every good surfaced highway?

A. Yes sir, that is true.

Q. And the ordinary dirt roads the trucks can't operate over them during rainy or wet seasons can they?

A. Some of them they can.

Q. But the most of them they can't?

A. That is perhaps true, yes.

Q. And thereby the better the road you have, the keener the competition that the motor truck is with the railroad?

A. I don't consider a motor truck a competitor of the railroad.

Q. You don't consider that they take any traffic away from the railroads?

A. I think they will bring in as much as they take away.

Q. Where do they bring it in?

A. By reason of the development of the community.

Q. Then when you say it will be a benefit it is a benefit that all the community brings?

A. That is not the only one.

181 Q. What does it do?

A. I enumerated the benefits.

Q. I would like for you to do it again, if you have no objection.

A. I outlined to you the business development of the berry and fruit industry in this district and the fact that this road is so located topographically that the lateral roads can now be developed and a great timber section can be opened up and delivered to your railroad.

Q. Well, to reap from this road the complete benefit, it would be necessary in your judgment for them to build some more lateral roads to connect up with this main road?

A. No sir, I didn't say that.

Q. Without this road there would be no possibility of opening up that timber section?

A. Those things cannot be done in a day. It takes time for these benefits to accrue to either real estate or to your railroad.

Q. There is no direct special benefit that would accrue to any particular tract of land? It would have to wait, as you suggest?

A. The benefits begin immediately upon the completion of the improvement but increase from year to year.

Q. What do you mean, the benefits will begin, what sort of benefits? A. There is numerous benefits.

Q. Immediately upon completion of the road what benefits will begin to the railroad?

A. This past year there was more strawberries in cultivation in Franklin County along this highway than ever before.

Q. Do you know what proportion of those strawberries are hauled by trucks out of there? Do you know what proportion of those strawberries the railroad hauls out of Franklin County?

A. I don't but I do know there is no regular truck line in Franklin County.

Q. Do you know that there are no trucks hauling berries to Van Buren?

182 A. I know that they cannot run over the road through Crawford County with a truck loaded a large part of the year.

Q. Don't you know that Meeks Brothers operate from here to Ozark regularly his motor truck?

A. No sir, I don't know that, and I don't think he does.

Q. Do you know what revenue is derived from traffic on strawberries, peaches or fruit, whether they can be hauled at a profit, or is it hauled at a loss?

A. I don't know. I don't suppose it is hauled at a loss.

Q. But the trouble with you, you don't know do you? You have no knowledge of the facts?

A. I haven't testified that I have. I have only testified as to my personal knowledge.

Q. You spoke about the Johnson County road not connecting up with the Franklin County road? A. Yes sir.

Q. You know considerable work has been done on that road?

A. I know there has been some work done on it.

Q. Do you know whether or not there is now a bill pending in the legislature, if it has not become a law, to complete that road, provide the revenue sufficient to complete that road?

A. No sir, I know on the other hand there is a bill pending to repeal the district.

Q. You have not read the bill introduced in the last few days by Mr. McKennon, Representative from that County?

A. No sir.

Q. Do you know there is a bill now pending to make a road from Van Buren to the Franklin County line?

A. I do know; I know they have repealed one district that covered that same territory.

Q. You kept up with every bill? That is a part of your business to watch that legislature to see how many bills it

grinds out contemplating the improvement of highways in the state?

A. That is a part of my business.

183 Q. I will ask you if you don't know there is a bill introduced by Mr. Galloway, representative from Sebastian County to include the Fort Smith District of Sebastian County in a district with Crawford County to build roads in Crawford County?

A. I know there is such a bill that was introduced, but on the other hand I know that some territory has been included in another district since by Senator Thompson. All of the Fort Smith territory that you speak of as being in Crawford County is now in another bill.

Q. Isn't that other bill by Senator Thompson to include the Fort Smith District in roads to build roads in the Greenwood district?

A. That perhaps might be true.

Q. This other bill was to include the Fort Smith district in a district with Crawford County?

A. Yes sir.

Q. Both these bills are still pending?

A. And they will be when they adjourn.

Q. Is that a part of your business?

A. I know the political situation just like you do.

Q. You think I do? A. Yes.

Q. You don't think either one of those bills will become a law?

A. I am judging them from past performances.

#### Redirect Examination

Q. Do you not know in the same way you know these other matters inquired about by Mr. Pryor, that this Galloway bill was opposed by the representatives in Crawford County and finally abandoned by Mr. Galloway? Did you get your information from the paper?

A. I did not.

Q. One other matter, you were asked about your commission. I will ask you if your business as civil engineer in the construction of the roads requires the services of a great number of persons and entails a large expense, does it?

A. It does.

184 Q. Can you state just in a general way whether or not a five per cent commission on the construction of a road would the engineer, considering the expense he has to pay, make a profit out of it?

A. I will state this: That for the past two years,—for the past 18 months I have refused to sign percentage contracts.



My contracts now are on a monthly basis. Without an exceedingly large volume of business you can't break even on the five per cent.

Q. What is the reason?

A. The expense of transportation, automobiles, wear and tear of equipment, the employment and expenses of the engineer has to be put in, performing the duties of his contract.

Q. And for that reason you have declined to sign a percentage contract, anywhere you work it is on a monthly basis?

A. Yes sir.

#### Recross Examination

Q. You spoke about the inducement good roads would be to the tourist investing?

A. I meant their travel. They are traveling in automobiles but they would not be in the country at all without good roads, so you are not losing any traffic.

Q. Do people traveling in automobiles constitute any considerable part of the travel?

A. In the state at this time, no. But when the entire system is connected up.

Q. And these tourists when they travel they travel in automobiles over the country?

A. Yes sir, and they would not be traveling through the country at all without the automobiles.

Q. You state it as a fact that they would not be traveling at all by railroads going to summer resorts or various places, they would not go at all?

A. It is my opinion that the majority of tourist travel will not go by rail. They go for pleasure, the pleasure of driving the car.

Q. You know that a great many of the automobiles in this state are used for business purposes in addition to pleasure? A. Some are, yes.

Q. And you know that they haul passengers too, do they not? A. There is some bus lines, yes.

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JOHN T. DONALD, a witness sworn on behalf of the plaintiff, testified as follows:

#### Direct Examination

Q. Your name is John T. Donald?

A. Yes sir.

Q. Where do you live? A. Ozark.

Q. How long have you lived in Ozark?

A. Twenty-three years.

Q. What is your business?

A. Selling lumber.

Q. Were you one of the commissioners that made the re-assessment of the property in Franklin County Road Improvement District No. 1? A. Yes.

Q. You served on the Board with E. B. Martin and C. B. Horton, did you not?

A. Yes sir.

Q. I will ask you to turn, Mr. Donald, to the assessment. The original assessment against the Missouri Pacific was \$62,054.00? A. Yes sir.

Q. It shows on the books benefits as reassessed \$75,686.00. What per cent, Mr. Donald, does that increase figure?

A. Forty.

Q. Did you know at the time of making the assessment that the original assessment was based upon the property valuation for general taxation purposes of \$711,325.00?

186 A. Yes.

Q. That was shown on the books? A. Yes.

Q. Now in making the forty per cent increase what elements of benefits were taken into consideration by the assessors?

A. The benefits to be derived from the construction of good road.

Q. I mean why did you make it forty per cent. Had you received any instructions from the Commissioners?

A. There had been some talk about the improved grade of the road, improving the grade and widening the hard surface, entailing an expenditure of more money.

Q. Was there any suggestion to the Assessors as to the extent of the increased expenditure?

A. It was suggested that forty per cent would meet the bill.

Q. And so the assessors then made the increase forty per cent of the original assessment?

A. After investigating the matter and satisfying ourselves that forty per cent was needed.

Q. After satisfying yourself that forty per cent was needed? Is that right? A. Yes.

Q. Then you made the increase? A. Yes.

Q. How did you consider in making that increase the benefits that would accrue to any particular piece of property, or was the increase based upon the original assessment?

A. I don't understand what you mean.

Q. I mean what was the basis?

A. Of course, we started in with the valuation. Now to raise 40 per cent, if I understand, to answer your question, we were expected to read out all that had gone before and

started with nothing to go on. We took the valuations that were on the book.

Q. You took the valuation of \$711,325.00 as a basis of the value for the property of the Missouri Pacific Railroad? A. Yes.

Q. Did you consider the fact that they had been assessed, the original assessment was \$52,046.00 against the Missouri Pacific? A. Yes.

Q. And then made the increase according to the original assessment? A. Yes.

#### Cross-Examination

Q. You are one of the assessors, you and Mr. Martin and Mr. Horton? A. Yes sir.

Q. Now a reassessment of benefits was ordered by the Commissioners, as I understand, and they informed you that it would require owing to the changes in construction of the road, the tax to do that, that it would require at least 40 per cent, or practically forty per cent more than the original assessment to complete the road? A. Yes.

Q. Then you had before you the original assessments of benefit and you considered this assessment of benefits. Then did you also consider that the property would be benefited by those changes and the better grade of the highway, the additional forty per cent? A. Yes.

Q. Is that the reason you put it on because upon investigation you found that that amount would be needed, or that the property would be benefited that amount?

A. We couldn't have done otherwise under oath.

Q. You thought it would be benefited forty per cent? Not simply because you needed the money?

188 A. No sir.

Q. You would not have done it if you had not thought it would be benefited that much?

A. No sir. To illustrate, my home property was assessed with a benefit of \$750.00, my neighbor's on the south was \$500.00 and my neighbor on the west \$500.00. To put this forty per cent on would bring them to \$750.00 each and mine to \$1050 and it was suggested that they pass over me and put us all at \$750.00. I believe my property was benefited the value of \$1050 by reason of the road and so I put it on.

Q. Did you do that way with the railroad too?

A. Yes sir.

Q. The reason you increased it was that you thought this completion of the road according to the plans and specifications the final completion of it would benefit the road the amount you assessed against it? Is that right?

A. Yes sir. After considering the whole situation we did.

Q. And you treated the railroad just like you treated the other property owners in the district?

A. We did.

#### Redirect Examination

Q. What elements of benefit did you take into consideration in fixing the benefits against the Missouri Pacific Railroad?

A. As they owned property upon the tax book, or in fixing the increase—

Judge Evans: If Your Honor please, there was a re-assessment. He said they wiped out the original and made an assessment of their own, but it was forty per cent more than the original.

The Court: The question that Mr. Pryor asked him: What were the elements they took into consideration?

A. To have a good road, the better roads we have the better community we have and the more business will be transacted.

189 Q. Then you believed the building of the good road would be a benefit to the community?

A. I do.

Q. In which all people would share alike?

A. I do.

Q. And all share in proportion? I mean receive the same benefits in proportion? Is that true?

A. No, I wouldn't say that.

Q. I mean in proportion to the amount of benefits assessed against their property?

A. It would be a physical impossibility to have that. One man has a thousand dollars worth of property and he is not using it, the road would not benefit that.

Q. Considering the uses to which it was put and everything else? A. Yes.

Q. Then there would be that community benefit that you refer to? A. Undoubtedly.

Q. Now what other benefit did you state, Mr. Donald? You said something about better business?

A. Building up of a community makes more business.

Q. Well, did you think that would help [the] benefit the property of the railroad? A. Yes.

Q. Now were those the only two elements you considered?

A. The better the community the more lumber they haul. The more lumber I sell the more lumber the railroad will haul.

Q. You don't use trucks in hauling your lumber?

A. We have to go to Southeast Arkansas and couldn't do that.

Q. Now, are those the only two elements considered by you, or do you think of any others?

A. The building up of a community just as has been said, it is far reaching, the more the community is developed the more we will produce in the way of strawberry crops

190 that each day go out from Ozark over the railroad.

Q. You say it is getting it now?

A. Yes sir.

Q. And has been getting it before this road?

A. To some extent.

Q. Did you take into consideration that in building the road that you were building up a competitor for the railroad which would detract traffic from it on account of motor trucks and the automobile?

A. We knew to some extent, but the benefits derived would overbalance the disadvantages.

Q. That there would be a possible increase in traffic?

A. Yes.

#### Redirect Examination

By Judge Evans:

Q. You spoke about the more the community was developed the more lumber you would sell and the more the railroad company would haul to you. Now you are engaged in the lumber business at Ozark? A. Yes.

Q. You also own property in Ozark and out in the country too, did you now? A. Yes.

Q. I mean speaking of the benefiting the property of the railroad, as I understand, is that the development of the country will furnish more business to the railroad?

A. Undoubtedly.

Q. And if the country develops the business of the railroad will increase and you will sell more lumber and that makes the railroad haul it to you?

A. Yes sir.

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J. D. McILROY, a witness sworn on behalf of the plaintiff testified as follows:

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#### Direct Examination

By Judge Evans:

Q. State your name, age and residence?

A. J. D. McIlroy, 61 years, Ozark, Arkansas.

Q. How long have you lived in Ozark?

A. Since 1876.

Q. Mr. McIlroy, have you held any official positions in Franklin County?

A. Yes sir, I was County Clerk six years and sheriff four years.

Q. Have you been connected in any way with Franklin County Road Improvement District No. 1?

A. Yes sir, for something like a year, I was a member of the Board of Commissioners.

Q. What year was that, Mr. McIlroy?

A. I believe, Mr. Pryor, it was some time in March 1920, to the first of February 1921.

Q. Well, since have you assisted the Board of Commissioners or Assessors in fixing the assessment of benefits against the property in the district? A. No sir.

Q. Were you on the Board of Commissioners at the time an increase in assessment of benefits was had in the district?

A. No sir, that was made after I went out.

Q. Were you present when that was made Mr. McIlroy?

A. No sir, I think not.

Q. Do you know how it was made?

A. No sir, I don't.

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C. E. HORTON, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Pryor:

Q. Your name is C. E. Horton?

A. Yes sir.

Q. Where do you live?

192 A. Altus.

Q. How long have you lived in Franklin County?

A. Thirty-five years, less five that I was out.

Q. Mr. Horton, are you connected in any way with Franklin County Road Improvement District No. 1?

A. Yes sir, I am in the place of Mr. Mosely as an assessor.

Q. The gentleman who testified here this morning?

A. Yes sir.

Q. How long have you served as a member of the Board of Assessors?

A. Something over two years.

Q. You were not a member of the Board of Assessors when the original assessment was made in the district?

A. No sir.

Q. Were you there as a member of the Board when the benefits were increased 40 per cent?

A. Yes sir.

Q. Who served with you on the Board at that time?

A. Mr. Martin and Mr. Dunham.

Q. Now you have examined the books for the valuation for general taxation purposes, shown on the books to be \$711,525.00? A. Yes sir.

Q. The books also show, do they not, that the original assessment of benefits was \$54,062.00?

A. Yes sir.

Q. You increased that assessment 40 per cent, did you not?

A. Yes sir.

Q. Why did you increase the assessment?

A. Well, sir, it was necessary to complete the road. The first assessment as I understand, was inadequate to complete it the width they figured on, a narrower road and they found it was not sufficient and they added this assessment to complete it the full width.

Q. You mean added the forty per cent increase?

193 A. Yes sir.

Q. Did you have any instructions with reference to how much it would require to complete it?

A. As I understand it, it would take 40 per cent of this special assessment to create funds enough to complete it.

Q. Who did you get your information from?

A. Mr. Martin told me, and we also had a letter from some official at Little Rock giving the estimate of amount it would require.

Q. And was that increase just made on account of the necessity for raising that money?

A. It was the only object we had to complete that highway.

Q. You didn't undertake to make a re-assessment of the property?

A. We just added that as a blanket assessment to create funds enough to complete the road, which was a thorn in the flesh the way it was. We was bothered with people on the west claiming that they had in fruits and berries and that that road wasn't finished, and we didn't have funds and something had to be done.

Q. How long were you engaged in reaching the conclusion that forty per cent was the increase that was necessary?

A. Well, I suppose the Commissioners computed the amount it would take. I suppose they did. We reached that conclusion from their suggestion. Mr. Martin told us it would take about that.

Q. It was in accordance with that suggestion that you proceeded to extend an increase of assessment of forty per cent on the books. A. Yes sir.

Cross-Examination.

Q. Did you attempt as an assessor to assess benefits according to the benefits that would accrue to each piece of property?

A. Yes sir.

Q. Did you do that? A. Yes.

194 Q. Then as I understand you, you were informed it would require forty per cent additional by reason of those changes? A. Yes sir.

Q. Then did you believe from an examination you made that the property of the railroad company would be benefitted the assessment which you made against it by the completion of the road? A. I certainly did.

Q. You assessed the benefit according to your judgment about the benefits that would accrue?

A. Yes sir.

Q. For in your judgment the road would have benefitted the assessment against it?

A. Yes sir. Mr. Miles, Jr., was there with us and he spoke about this. I told him we needed the money. I went on to say that I did not think the original proportion in proportion to what the farmers were paying, the proportion that was made that it would not be benefitted that.

Q. And you considered that. Did Mr. Miles present such objections?

A. Yes sir, he appeared and said he objected to us putting this extra assessment on. I told him I couldn't see his reason, that I believed it was a just one.

Q. The assessment against the railroad?

A. In fact that the books did not show that the original proportion to what the other people adjacent to the road had paid. It seemed to me that the farmers and land owners of the various kinds it seemed to me were paying 30 per cent of the assessed valuation and the railroad company wasn't paying near up to that percentage.

Q. Now then the point I am getting at the reason you put the assessment at what it was because you believed the railroad company, the plaintiff here, would be benefitted fully that amount? A. I certainly did.

195 Q. And you put it as to the other pieces of property because you believed the completion of the improvement would benefit the property the amount you assessed against it? A. Yes sir.



Q. How long were you considering this question of whether or not plaintiff would be benefitted the amount of 40 per cent in addition to what had been assessed before?

A. We were in session awhile getting a line on the proposition, and of course we did not give it any due consideration, it was too plain a case to me. The road is a tributary as I told Mr. Miles, to the railroad line. He said it was paralleling it. I says, "It takes this freight and labor that has been working on this road, the whole field tributary to this pike road". One noticeable fact down there is in the increase of lumber. I stay with a lumber dealer quite a bit and their volume of business has increased double from tourists coming in and settling up. I think that is one cause of it.

Q. After you had made your first assessment of the matter and concluded that the property would be benefitted 40 per cent additional to what it had been assessed, did you publish a notice for three weeks and invite every tax payer in to a hearing on that matter?

A. Yes sir, there was a notice published in the local paper.

Q. For how long?

A. I believe it was three weeks prior to our meeting.

Q. And then did you hear every tax payer who wanted to be heard.

A. Yes, sir, we had several to come in, farmers, and the railroad people appeared.

Q. That is when Mr. Miles appeared?

A. Yes sir.

Q. And after notice and after hearing the assessors were of the opinion that the railroad company would be benefitted the amount in the assessment?

196 A. Yes sir.

Q. That was your opinion then and that is your opinion now?

A. We were sworn to do our duty.

Q. And only assessed such benefits as you believed the property would receive by the building of the road?

A. Yes sir.

Q. Now did you consider all other objections and pass on them too?

A. Yes sir, there was two or three come in and it was proven beyond any reasonable doubt that their property was assessed too much in proportion to land adjacent to it, and we did not put the forty per cent on one or two pieces of land that we thought was out of line. That was in our power to withhold the forty per cent or to apply it.

Q. I understood you to state that the development of the country would bring business to the railroad?

A. Yes sir.

Q. Is that your opinion now?

A. Yes sir, it is my honest opinion and this has proven out.

Q. In what way has it proven out?

A. I notice one noticeable thing in Ozark there is a young fellow by the name of Williams shipping in all kinds of perishable vegetables from the south. He loads it in his truck at Ozark and supplies the stores. That is shipped in, something we were used to, shipped in there by rail in carload lots. I have a fruit tree agent friend of mine who tells me his business is increasing daily since this pike was so they can haul their fruits and berries.

Q. What about the business of the railroad company in Altus?

A. We are trying to get a new depot built there and in January I had occasion to ask the agent how his volume of business was compared to what it was before.

197 Q. Do you know as a matter of observation yourself whether or not the volume of business at Altus has been increased lately?

A. Yes sir, from a railroad point of view. Yes sir; five hundred dollars more in January last than a year ago.

Q. You state now somebody told you. Can you state that your own observation is that that has been increased?

A. No.

Mr. Pryor: I will ask that that be excluded.

The Court: That will be excluded.

Q. It is your observation, though, as I understand you, that there is a considerable increase in the development of the country since the completion of this highway and that the railroad business has been increased? A. Yes sir.

Q. And those are the things that you took into consideration in concluding that the railroad company's property would be benefited the amount you assessed against it?

A. Yes sir.

Q. And you believe it to be true now? A. Yes sir.

#### Redirect Examination

By Mr. Pryor:

Q. You state that you made a re-assessment. What elements of benefits did you consider in making that re-assessment?

A. Well, sir, the elements, we would complete the road. We hadn't anything until we could get money enough to finish the road. It wasn't worth anything to anybody, railroad or anybody else. You might say it was a nuisance, a bone of discontent in the community.

198 Q. I am asking you what elements were considered by you in fixing the assessment of benefits against the railroad property?

A. Well, sir, merely as an easy haul to the Railroad Company's line.

Q. Don't you know that that road as constructed parallels the line of the railroad company? A. Yes sir.

Q. It reaches every town that the railroad company reaches? A. Yes sir.

Q. Now I will ask you if it is the probable increase of traffic was the basis for the assessment of benefits?

A. Yes, sir, in the way of freights.

Q. And that was the basis then? A. Yes sir.

Q. I will ask you if you took into consideration the value of the property as shown on the collector's books, the value for general taxation purposes?

A. We considered the assessed valuation.

Q. That was \$711,325.00? A. Yes sir.

Q. Then you considered what you thought would be an increase in the traffic? A. Yes sir.

Q. Was that the only two elements you considered, first, the assessed valuation for general purposes, and then the probable increase in freight traffic?

A. Why, yes, sir; we have undeveloped territory there from the fact they have no way of hauling their truck, such as berries and fruit in that rough country. If they take the financing and upkeeping the 22 miles of road and connect up laterals to your main line there is no question but what it will develop the country.

199 Q. You say if they do build those laterals to connect up. The laterals have not been built?

A. Yes sir, they are improving yearly.

Q. Better than you find out in road improvement districts too?

A. No sir, but if they will use the money derived from the building of this highway to even grade the road, we have one graded road, graded up from the native dirt.

Q. I just wanted to get down all the elements that you have fixed you have stated that you did consider the valuation as is shown on the tax books?

A. Yes sir, we used that as a basis.

Q. Now the next thing you considered was the increase in freight traffic? A. Yes sir.

Q. Anything else you considered?

A. Well, that is mostly what we considered.

Q. Now you stated a moment ago about some fellow by the name of Williams driving through the country with a truck?

A. Yes sir.

Q. Do you know how that stuff reaches Ozark?

A. It has to come in cold storage cars, there is no other way.

Q. Do you know where it comes from?

A. Possibly from Florida or Louisiana or California.

Q. Do you mean to say there has ever been a carload of truck stuff shipped from Florida or California to Ozark?

A. I am inclined to think so. It comes in barrels shipped by freight or express and he gets it in carload lots.

Q. Lots of it comes by express? A. Possibly so.

Q. The express company handles that?

A. Possibly so; he gets it in great quantities.

Q. Do you know whether that is shipped out of Fort Smith?

A. I hardly think so. I don't believe he could get it here and make it profitable.

Q. Did you take into consideration the effect that the competition of the motor truck would have on the railroad traffic?

A. I don't think a motor truck is any competition to the railroad at all.

Q. Do you think an automobile is any competition?

A. Well, the passenger part of it, I believe it is a little detrimental.

Q. But in the freight it doesn't amount to anything?

A. I don't think they are any competition at all. I had a little experience along that line myself.

Q. You stated about the railroad not being assessed as large a percentage as the other property in the district. Do you know that the original assessment divided the district up into zones, or do you know anything about that?

A. I could tell by the books.

Q. You didn't see the maps? A. Yes sir.

Q. You knew that it had been divided up into zones?

A. Yes sir.

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R. E. WARDEN, being recalled by the plaintiff, testified as follows:

Direct Examination

By Mr. Pryor:

Q. Mr. Warden, have you examined the assessment book from which the witness testified this morning? A. Yes sir.

Q. Showing the valuation of the property of the Missouri Pacific in this district to be \$711,325.00? A. Yes sir.

Q. Do you know of what that valuation consists?

A. Yes, sir.

Q. Have you a certified copy of the assessment made by the State Tax Commission? A. Yes sir.

Q. Have you that certified copy with you?

A. Yes sir.

Q. I will ask you to refer to that Mr. Warden, and state of what that valuation consists?

Judge Evans: I think the certified copy would be the best evidence.

A. It consists of all of the Missouri Pacific Railroad property in Franklin County, all of which is embraced in Franklin County Road Improvement District No. 1, and it is subdivided into headings such as this under the heading of main track there is shown [\$]31.25 miles, valuation thereof \$604,110.00. Under the heading of sidetracks 11.98 miles with a valuation of \$35,940.00; rolling stock \$52,075.00; buildings \$18,810.00, and under the heading of Valuation of Materials and Stores of heavy kind \$390.00, and under the heading Total Valuation in School District, \$711,325.00. The sum total of these valuations herein recited is the last figures \$711,325.00.

Q. How much of that then is personal property as shown there?

A. All of the rolling stock in the amount of \$52,075.00, all of the values of materials and store of every kind. Personal property totals \$52,465.00, of the \$711,325.00.

Q. That is personal property?

A. That is personal property.

Mr. Pryor: I offer now in evidence certificate of the Arkansas Tax Commission, a certified copy of the Arkansas Tax Commission.

Judge Evans: We do not object to it being put into the record for whatever it is worth.

The Court: Very well; it will be received.

202

## "Ex. E, JKP.

## Railroad Certificate.

Value of "Railroad Tracks", "Rolling Stock and Buildings" and "Materials and Stores" belonging to or operated by the Missouri Pacific Railroad Company on the first Monday in May, 1918, located in the County of Franklin, State of Arkansas, and in the cities and incorporated towns in said county as fixed by the Arkansas Tax Commission for the year 1918.

## Rolling Stock and material and stores assessed as personal property.

No. or Name of School Dist.	Main Track	Valuation	Side Track	Valuation	Rolling Stock	Buildings	Valuation of Materials & Stores of every kind	Total Val. in School Dist.
33	204	51000			5100			56100
96						7400	50	7450
70	250	62500			6250	1020	60	69830
31	200	50000	60	1800	5000	1840	70	58710
14	230	37500	157	4710	3750	8060	80	76100
22	150	37500			3750	10		41260
20	275	68750	80	2400	6875		50	78075
4	262	65500	14	420	6550	60	40	72570
38	249	62250			6225	420	40	68935
30	263	65750			6575			72235
*Ozark-Hartman								
33 Spur	300	24000	381	11430				
60	300	24000	300	9000				
96	283	22640	200	6000				
Coal Hill								
Spur	159	12720	06	180				
Total	3125	604110	11.98	35940	52075	18810	390	711325
Total M.								
Line	2083	520750	3.11	9330	52075	18810	390	601355
Totalspur	1042	83360	8.87	26610				109970

## Cities and Incorporated Towns.

Note.—The amounts rendered below are not to be added to amounts rendered above. Rolling stock and material and stores assessed as personal property.

Town or City	Main Track	Valuation	Side Track	Valuation	Rolling Stock	Buildings	Valuation of Materials & Stores of Every kind	Total Val. in City or Town
Denning	1.02	25500			2550	1010	70	29130
Ozark	1.70	42500	1.27	3810	4250	8060	80	58700
Altus	.50	12500	.45	1350	1250	1840	60	17000

203 Office of Arkansas Tax Commission  
Little Rock, Arkansas.

I, E. W. Brown, Secretary of the Arkansas Tax Commission, do hereby certify that the above is a true and perfect statement of the value of all property belonging to or operated by Missouri Pacific Railroad Company on the first Monday in June, 1918, located in the County of Franklin, State of Arkansas, and in School District cities and incorporated towns in said county, and to be taxed therein for the year 1918, as found by the Arkansas Tax Commission.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Arkansas Tax Commission, at Little Rock, this 13th day of December, 1922.

E. W. BROWN,  
Secretary of Arkansas Tax Commission."

G. C. CARTER, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Pryor:

Q. Your name is G. C. Carter? A. Yes sir.

Q. You live at Ozark? A. Yes sir.

Q. And are engaged in the practice of law there, are you Mr. Carter? A. Yes sir.

Q. How long have you lived at Ozark? A. Since 1910.

Q. You are the attorney for the Franklin County Road Improvement District No. 1? A. One of them.

Q. It was the firm of Partain and Carter?

A. Yes sir.

204 Q. I will ask you if you were in the legislature as a representative from Franklin County during the session of 1919? A. Yes sir; one of them.

Q. Did you introduce the bill creating Franklin County Road Improvement District No. 1? A. Yes sir, I did.

Q. I will ask you, Mr. Carter, if you exhibited on the floor of the General Assembly of the State any evidence of publication of notice of the intention to introduce such a bill?

Judge Evans: We object to the introduction of that testimony. If the court is not entirely familiar with the rule laid down by our Supreme Court—

The Court: I think the court holds that is what is termed a legislative dictum inquired into by the court. The fact, however, may go in and it will then be a question of whether

this court is bound by the construction that the Supreme Court gives it.

Judge Evans: We desire to save an exception to its introduction into the record for any purpose.

Q. The question was whether there was exhibited on the floor of the General Assembly any notice or evidence of any publication of notice of any intention to introduce the bill creating Franklin County Road Improvement District No. 1?

A. There was not, so far as I know.

Q. Did you draft that bill Mr. Carter?

A. I don't think I did. I don't remember.

Q. You participated in the drafting of it? Who did draft it, if you recall? A. I couldn't tell you that, Mr. Pryor.

Q. Was the bill drafted before you went to the legislature or while you were there?

205 A. I think a committee there had made it and had it in charge and the first I remember of it they gave me the bill. I don't know who drew it; couldn't state.

Q. Had you been selected at that time as attorney for the District in the event the bill passed the legislature?

A. No sir.

Q. Do you know whether or not any such notice was ever published? A. I don't know of any.

Q. You do know that you did not exhibit any on the floor of the General Assembly?

A. I know that I did not exhibit any.

Q. And you introduced the bill? A. Yes sir.

Judge Evans: We move to exclude all the testimony with reference to the notice, or exhibiting the notice.

The Court: Motion will be overruled.

Judge Evans: We save an exception.

#### Cross-Examination

By Judge Evans:

Q. Mr. Carter, you say you were one of the representatives in the Legislature of that session of 1919? A. Yes sir.

Q. Who was the other? A. G. A. Henry.

Q. Was he one of the authors of this bill or do you know?

A. I don't remember whether he signed the bill or not.

#### Redirect Examination

By Mr. Pryor:

Q. Mr. Carter, I will ask you if as attorney for the district you have had charge of all legal matters connected with it?

A. Yes sir, Mr. Partain and I have.



Q. Now there was subsequently introduced in the General Assembly of 1921 a bill purporting to confirm and validate the assessments made, was there any notice ever published or of an intention to publish that bill?

206 Judge Evans: We object.

The Court: The same ruling.

Q. During that entire session I was not down there. All I know was to see the act in the Special Acts.

Q. Didn't you draw that act?

A. No sir.

Q. Who did? Do you know?

A. I couldn't tell you.

Q. You were not a member of the legislature?

A. No sir.

DAVE PARTAIN, a witness sworn on behalf of the plaintiff, testified as follows:

#### Direct Examination

By Mr. Pryor:

Q. Your name is Dave Partain?

A. Yes sir.

Q. You are engaged in the practice of law at Ozark?

A. Yes sir.

Q. You have been the attorney for the Road Improvement District since the act of 1919 was passed?

A. Since the organization of the district.

Q. Now Mr. Partain, I will ask you whether or not you know if there was ever published any notice of an intention to introduce the act creating the district before the same was introduced in the legislature?

Judge Evans: We object.

The Court: The same ruling.

Judge Evans: Exception.

A. As to that I don't know Mr. Pryor, because the legislature of 1919 as I recall, at the beginning of the session I was not in Franklin County. I was in the Army and hadn't got back.

Q. As a matter of fact, Mr. Partain, don't you know as an attorney for the district, you did not consider it necessary to publish such notice?

207 Judge Evans: We object to that.

The Court: I don't think that is material. The simple question is whether or not there was such a notice published.

Q. You have no knowledge of any such notice?

A. No sir, I don't.

Q. And you have been attorney for the district?

A. Yes sir, along since some time in April 1919.

Q. With reference to the notice being published as to the bill that became a law in 1921, or that was passed by the legislature in 1921, confirming and validating the assessment made in that District—

Judge Evans: We object for the same reason.

The Court: Objection overruled.

Judge Evans: Exception.

A. No sir, I don't. I don't know of any notice.

Q. Do you know of any notice being published for the act that has just recently been passed, the 12th day of February 1923, attempting again to confirm and validate the assessments? A. Yes sir.

Q. There was such a notice?

A. Yes sir.

Q. Where was that published, Mr. Partain.

A. It was published in the Democrat Enterprise, a weekly paper published at Ozark.

Q. But the other two acts were not.

A. So far as I know. I have no personal knowledge of any notice.

Judge Evans: Your Honor understands that we save an exception on the question of any proof on notice, and we save our exception.

#### Cross-Examination

By Judge Evans:

Q. Mr. Partain, if I understand you correctly, so far as you know there was no notice given of the intention to introduce the bill for the act originally creating the district?

208 A. No sir.

Q. At that time you had nothing whatever to do with it?

A. Nothing whatever; I knew nothing about the creation of the District until after the act was passed and the district was created.

Q. So you have no knowledge on that subject?

A. No sir.

Q. Now then the amendatory act of 1921 validating the assessments; you were attorney for the district at that time?

A. Yes sir, I was.

Q. Who prepared that bill, do you know?

A. Yes sir, I did.

Q. Was there any notice given for the introduction of that bill so far as you know?

A. So far as I know there was not.

Q. The amendatory act prepared for the 12th of February, 1923, who prepared that? A. I did.

Q. You stated to Mr. Pryor that was published in the Democrat Enterprise, of Ozark, Arkansas, of the proposed bill? A. Yes sir.

Q. Was it published for the length of time required by the statute and the constitution?

A. Yes, sir, for more than that. Something like six weeks.

Q. Do you know whether or not evidence of that was presented to the legislature and entered upon the records?

A. Yes sir, it was.

Q. Have you copies in your possession, or have you here somewhere copies of the notice and of the endorsement on the record?

A. I have a certified copy of the journal entry of the record of the passage of the bill and showing the notice.

Q. I wish you would produce that and file it with the stenographer.

The Court: Very well; it will be received.

209 Q. Have you a copy of the Act of February 12, 1923?

A. Yes sir.

Q. Is that attached to the copy of the notice that was published?

A. It is attached to the copy of the proof or affidavit of publication of notice.

Q. But you have filed here the notice itself?

A. Yes sir.

Q. You state it was published for six weeks before the introduction of the bill?

A. Yes sir.

Q. And it was exhibited with the bill on the floor of the house? A. Yes sir.

Q. And you file that now with the stenographer?

A. Yes, sir.

#### Redirect Examination

By Mr. Pryor:

Q. Mr. Partain, why did [yo] have notice published of the bill that you have just referred to, introduced this year and approved February 12, 1923, notice published of the intention to introduce that and did not have such notice published for the bill that was introduced in 1921?

A. Well, principally this reason: The Candidate for representative in Franklin County announced, when he was a candidate for office, announced that he would not introduce any bill unless notice had been published, and he was a pretty stubborn gentleman and we complied with his requirement.

Q. It was on account the policy announced by the Governor?

A. Particularly on account of the policy announced by Mr. Henry.

Q. He wanted to comply with the constitution with reference to local bills?

A. I don't know what his reason is. I don't know whether he knows anything about the constitution. He wanted the notice given.

“Ex. F. JKP.

No 376 by Mr. Henry. A bill for an Act to be entitled, 210 ‘An Act for the relief of Road Improvement District

No. 1 of Franklin County, Arkansas, to validate the creation and establishment of said district: to fix, confirm, establish, approve and declare the benefits assessed and accruing to the several and particular tracts of land, railroads and tramroads, telegraph lines, telephone lines, electric lines, and pipe lines within said district by reason of the local improvement therein, and for other purposes. Feb. 1, 1923. Read the first time, rules suspended and read the second time and took its place on the calendar.

H. B. No. 376 by Mr. Henry: A bill for an act to be entitled ‘An Act for the relief of Road Improvement District No. 1 of Franklin County, Arkansas; to validate the creation and establishment of said district: to fix, confirm, establish, approve and declare the benefits assessed and accruing to the several and particular tracts of land, railroads, and tramroads, telegraph lines, telephone lines, electric lines and pipe lines within said district by reason of the local improvement therein, and for other purposes.’

Feb. 6, 1923. Was read the third time and placed on final passage. The question being shall the bill pass, the Clerk called the roll when the following voted in the affirmative:—

Messrs. Alexander, Arnold, Baskin, Bagby, Belote, Blackwell, Bohlinger, Bone, Burnside, Butler, Cannon, Caudle, Chalmers, Chambers, Chaney, Cook, Copeland, Crockett, Denison, Dewitt, Dillard, Eades, Gannaway, Garrett, Glover,

Hardy, Harp, Hays, Henry, Herndon, Hill, Holland, Horn, Hunt, Hurley, Jackson, Johnson of Madison, Johnson of Polk, Kelly, Kendall, Kitley, Klepper, Lamore, Leathers, Lewis, McCullough of Lee, McKennon, McKinney, Montgomery, Morris, Moss, O'Neill of Cleveland, O'Neal of Franklin, Page, Parker, Parks, Perry, Plunkett, Quarles, Ray, Rutherford, Shackelford, Shaddock, Sheffield, Smith of Jackson, Smith of Lincoln, Spradley, Stevens of Columbia, Stevens of Craighead, Street, Stuart, Sutton, Timberlake, Walker, Ward, Webb, Woolsey, Mr. Speaker. Total 79.

The following voted in the negative:— None.

The following were absent and did not vote: Messrs Ben-  
211 net, Branscomb, Bookfield, Brown, Cardwell, Davis,  
Galloway, Grimes, Harper, Harrelson, Hoover, Hughes,  
Hutton, McCullough of Lawrence, McGeehee, McLaughlin,  
Noe, Portis, Reynolds, Riggs, Smothers, Total 21.

Total number of votes cast 79.

Necessary to passage of bill 40.

Total number voting in the affirmative 79.

Total number voting in the negative, None.

Number absent and not voting 21.

So the bill passed and the title as read was agreed to.

The following notice and proof of publication appears of record:

'Notice of the introduction of local and special bill'. Notice is hereby given that at the forthcoming session of the General Assembly of the State of Arkansas, which meets at the Capitol of said State in the month of January 1923, a special and local bill will be introduced, and its passage applied for, for the relief of Road Improvement District No. 1 of Franklin County, Arkansas, which bill will provide, among other things, for validating the creation and establishment of said district and especially fixing, confirming, establishing, approving and declaring the benefits assessed and accruing to the several and particular tracts of land, railroads and tramroads, telegraph lines, telephone lines, electric lines and

pipe lines within said district by reason of the local improvement therein.

Given this the 20th day of December, 1922.

E. R. PROTHEROE,  
Sec. Board of Commissioners,  
Road Improvement District No. 1 of  
Franklin County, Arkansas.

State of Arkansas,  
County of Franklin—ss.

I, S. J. Forrest, editor and published of the Democrat Enterprise, a weekly newspaper published in the town of Ozark, Franklin County, State of Arkansas, do solemnly swear that the publication, of which the annexed is a true copy, was published in said paper six times as follows:

212 Dec. 21 and 28, 1922 and Jan. 4, 11, 18, and 25th, 1923.

And the said newspaper was published and had a bona fide circulation more than one month before the first insertion, and during the time of the publication of said order, in Franklin County.

S. J. FORREST,  
Editor and Publisher, of the Democrat-Enterprise.

Sworn to and subscribed before me this 6th day of February, 1923.

Printer's fee \$7.50.

Feb. 7th, 1923. H. B. No. 376 by Mr. Henry, transmitted to the senate.

Feb. 10th, 1923, H. B. No. 376 by Mr. Henry, Returned from the Senate as passed.

Feb. 12, 1923, H. B. No. 376 by Mr. Henry, Reported signed by the Governor.

I, H. G. Combs, Chief Clerk of the House hereby certify that the above and foregoing is a true and correct copy of the Journal proceedings on the introduction and passage of H. B. No. 376 by Mr. Henry.

Given under my hand as such clerk this 26th day of February 1923.

H. G. COMBS, Chief Clerk."

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Mr. Pryor: I desire to introduce the deposition of IRA C. HOPPER, Secretary of State.

Judge Evans: That is with reference to the record of the publication of notice and so on in the original and first amendatory act. The same objection to that Your Honor.

The Court: It will be admitted and your objection to it will be overruled and your exceptions will be noted.

Interrogatories to be Addressed to Ira C. Hopper.

No. 1. Please state your name, age, residence and occupation.

Ans. 1. Ira C. Hopper, age 31, residence Little Rock, Secretary of State.

No. 2. What official position did you hold with the State of Arkansas throughout the years 1919, 1921?

Ans. 2. I was not employed by the state in 1919, but became Secretary of State in January 1921.

No. 3. As Secretary of State, please state whether or not any notice was ever filed with you of the passage of Special Act No. 588, entitled—"An Act to provide for the construction and maintenance of Road Improvement District No. 1 of Franklin County, Arkansas, and for other purposes."

Ans. 3. The original act after being passed was signed by the Governor and then filed with me, further than this I would not get any notice of passage.

No. 4. Please state whether or not any notice of the passage of Special Act No. 626, approved March 29th, 1921, was ever filed with you.

Ans. 4. No, none more than stated above, viz., the filing of the approved bill in my office.

No. 5. Please state whether or not evidence of the publication of a notice of the passage of either of the above acts was exhibited in the General Assembly.

Ans. 5. My records do not show that such evidence was exhibited in the General Assembly, however, this might have been done and no record made, as the law does not require this proof filed with me.

(Signed) IRA C. HOPPER,  
Secretary of State.

Plaintiff rests.

Judge Evans: If Your Honor please, the defendant is willing to rest the matter on the testimony already introduced.

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## 214 Stipulation that Evidence Need not be Reduced to Narrative Form.

Whereas, in the above entitled cause the question to be determined by the appellate court on appeal is largely a question of fact. Counsel for the parties hereto respectfully represent and show to the court that, in the opinion of said counsel, this cause cannot be fully and properly presented by an abbreviation of the record as provided by Equity Rule No. 75, and counsel therefore requests that the entire evidence be sent up in full.

It is hereby stipulated and agreed that said evidence may be sent up in full, together with the exhibits introduced at the trial of this cause.

This 30th day of August, 1923.

THOS. B. PRYOR,  
Counsel for Plaintiff.

G. C. CARTER,  
DAVE PARTAIN,  
Counsel for Defendants.

## 215 (Approval of Statement of Evidence by District Judge.)

The foregoing is approved as correct and complete statement of the evidence presented in this cause.

The same is approved in this unabbreviated form in view of the stipulation of counsel of August 30th, 1923, hereto attached and made a part hereof.

This 30th day of August, 1923.

FRANK A. YOUNG, Judge.

## 216 Petition For Appeal.

(Filed in U. S. District Court August 30, 1923.)

To the Honorable Frank A. Young, Judge of said Court:

And now comes Road Improvement District Number One of Franklin County, Arkansas, and Jerome Wilson, E. R. Prothero, and Whit Martin, Commissioners, defendants in the above entitled cause, by their attorneys, and feeling themselves aggrieved by the final decree of this court, entered on the 26th day of April 1923, hereby pray that an appeal may



be allowed to them from the said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and in connection with this petition, petitioners herewith present their assignment of errors.

G. C. CARTER,  
DAVE PARTAIN,  
Attorneys for Defendants.

Appeal allowed August 30, 1923.

FRANK A. YUMANS, Judge.

217

Assignment of Errors.

(Filed in U. S. District Court August 30, 1923.)

Now comes the appellants, Road Improvement District No. 1 of Franklin County, Arkansas, and Jerome Wilson, E. R. Prothero, and Whit Martin, Commissioners, by their attorneys, and in connection with their petition for an appeal, says that, in the record proceeding and in the final decree aforesaid, manifest error has intervened to the prejudice of the appellants, to-wit:

1. The court erred in not holding that the plaintiffs Bill of Complaint, Amendment thereto, and Substituted Bill of Complaint and each paragraph thereof, does not state facts sufficient to constitute a cause of action and in denying the defendants motion to dismiss the suit.

2. The court erred in finding and adjudging that the plaintiff is entitled to the relief prayed for.

3. The court erred in its holding and finding of law and fact Number One, that the assessment against the property of the defendant includes personal as well as real property, and that the inclusion of personal property is unlawful.

4. The court erred in finding in its finding of law and fact Number Two, that the assessment against the real estate is on a mileage basis of the plaintiff; and erred in its finding and holding that the assessment against other real estate is upon an area at a certain amount per acre dependent

218 upon distance from the highway contemplated; and erred in finding and holding that this method of assessment is palpably arbitrary and discriminatory and results in a denial to the railroad company of equal protection of the law.

5. The court erred in its finding and holding as a matter of fact that the assessment against the real estate of the Railroad was made on any other or different basis to that of other real property in the district.

6. The court erred in finding and holding as a matter of law and a matter of fact that the method of assessment used is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the law.

7. The court erred in finding and holding as a matter of fact that there would be no direct benefit to the property of the railroad company by the construction of the highway, and on the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway, in its finding number three.

8. The court erred in its finding number four, in finding and holding that an indirect benefit to the railroad company by the construction of the highway is remote, doubtful and speculative.

9. The court erred in not holding that the plaintiff railroad company is liable in any event for at least the amount of taxes conceded by it in its pleadings to be due and tendered by it into court, the same being the sum of \$250.00 per mile.

10. The court erred in finding and holding that the prayer of the bill for relief as against the assessment should be granted.

11. The court erred in finding and holding that the temporary restraining order should be made permanent and that the defendants their successors and those acting under them, should be forever enjoined and restrained from collecting or attempting to collect the tax or any portion thereof assessed against the property of the railroad company, and that the assessment of benefits and the  
219 increase in same should be cancelled, set aside and held for naught.

12. The court erred in not finding and holding as a matter of law and as a matter of fact that the terms and provisions of Act No. 626 Approved March 29, 1921, of the Acts of the General Assembly of State of Arkansas for the year 1921, confirming and validating the assessment of benefits in the defendant road improvement district, and fixing and confirming the assessment of benefits as originally made as against the property of the plaintiff in the sum of \$54,062.00 is con-

clusive upon the property within the improvement district including the property of the plaintiff.

13. The court erred in not finding and holding that the terms and provisions of the Act of the General Assembly of the State of Arkansas for the year 1923, approved February 12th, 1923, the same being Act N. . . . fixing, confirming, establishing, and approving the benefits assessed against the real property in the defendant district, including that of \$75,686.00 against the real property of the plaintiff is binding and controlling as a legislative determination of benefits against the property in the road district, including that of the plaintiff.

14. The court erred in not giving effect to the provisions of the respective acts of the legislature of the State of Arkansas fixing and determining the benefits accruing to the real property in the defendant district, including that of the plaintiff railroad company.

15. The court erred in receiving over the objection and exceptions of the defendant the testimony of G. C. Carter and Dave Partian, that they had no knowledge of the publication of any notice of the introduction of the Act creating the defendant road improvement district, or of Act No. 626, the Acts of 1921, determining and confirming the benefits therein.

16. The court erred in receiving over the objections and exceptions of the defendant the testimony of Ira C. Hopper, Secretary of State, that "My records do not show that  
220 such evidence (Evidence of Publication of Notice of the introduction of Acts No. 588 of the Acts of 1919 and 626 of the Acts of 1921) was exhibited in the General Assembly, however this might have been done and no record made as that law does not require this proof filed with me."

17. The court erred in receiving in evidence over the objections and exceptions of the defendant an evidence as to the publication of notice.

18. The decree is against the manifest weight of the evidence.

19. The decree is contrary to law.

Wherefore, the appellants pray that the decree of the United States District Court for the Western District of Arkansas, may be reversed, and that said District Court be ordered and directed to dismiss plaintiffs bill, and dissolve

and set aside said injunction and restraining order, and such other relief as to the court seemeth proper.

G. C. CARTER,  
DAVE PARTAIN,  
Attorneys for Appellants.

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**Bond on Appeal.**

(Filed in U. S. District Court October 13, 1923.)

Know All Men By These Presents: That we, Road Improvement District No. one of Franklin County, Arkansas, as Principal, and F. E. Stockton, and M. B. Conatser, as surety, of the County of Franklin, State of Arkansas, are held and firmly bound unto the Missouri Pacific Railroad Company, in the sum of Three Hundred (\$300.00) Dollars, lawful money of the United States, to be paid to it and its executors, administrators, and successors to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally and each of our heirs, executors and administrators by these presents. Sealed with our seals and dated this the 12th day of October, 1923.

Whereas, the above named Road Improvement District No. one of Franklin County, Arkansas, has prosecuted a writ of error to the United States District Court from the Western District of Arkansas, Fort Smith Division, to the United States Circuit Court of Appeals, for the Eighth Circuit, in the above cause.

Now, therefore, the condition of this obligation is such that if the above named Road Improvement District No. one of Franklin County, Arkansas, shall prosecute its said appeal to effect and answer all cost, if it fails to make good its  
222 appeal, then this obligation shall be void, otherwise to remain in full force and effect.

**ROAD IMPROVEMENT  
DISTRICT NO. ONE OF  
FRANKLIN COUNTY,  
ARKANSAS,  
By W. A. Martin,  
Jerome Wilson, Treas.**

E. R. Prothero, Sec.  
Commissioners of Road Improve-  
ment, District No. 1 of Franklin  
County, Arkansas.  
M. B. Conatser, Surety,  
Finis E. Stockton.

Approved:  
Frank A. Youmans,  
Judge.

State of Arkansas,  
County of Franklin—ss.

On the 12th day of October, 1923, personally appeared before me, Finis E. Stockton, and M. B. Conatser, respectively known to me, to be the persons described in and who duly executed the foregoing instrument, as parties thereto, and respectively acknowledged each for himself, that they executed the same as their free and voluntary act and deed for the purposes therein set forth, and the said Finis E. Stockton and M. B. Conatser, being respectively by me duly sworn says each for himself and not one for the other that he is a resident and householder of the said County of Franklin State of Arkansas, and that he is worth the sum of Three Hundred (\$300.00) Dollars over and above his just debts and legal liability and property exempt from execution.

FINIS E. STOCKTON,  
M. B. CONATSER, Surety.

Subscribed and sworn to before me on this the 12th day of  
October, 1923.

OTTO W. KAYER,  
Notary Public.

My commisison expires Dec. 29, 1923.

(Seal)

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(Clerk's Certificate to Transcript.)

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing pages to be and constitute a true and correct copy of the record, assignment of errors, and all proceedings, beginning with the filing of the amended and substituted bill of complaint, in the case of Missouri Pacific Railroad Company, Plaintiff, vs. Road Improvement Dis-

trict No. 1 of Franklin County, Arkansas, Defendant, No. 309 Equity, as the same appear on file and of record in my office as such clerk in the Fort Smith Division of said District.

Citation, with acceptance of service is annexed and transmitted herewith.

Seal  
U. S. Dist. Court  
West. Dist.  
of Ark.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court at office in the city of Fort Smith, Arkansas, this 17th day of October, 1923.

WM. S. WELLSHEAR, Clerk.

Filed Nov. 21, 1923, E. E. Koch, Clerk.

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IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT  
No. 6533

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN COUNTY,  
ARKANSAS, Appellants,

vs.

MISSOURI PACIFIC RAILROAD COMPANY

APPEARANCES OF COUNSEL—Filed November 21, 1923

The Clerk will enter my appearance as Counsel for the Appellants,  
Dave Partain, G. C. Carter, Ozark, Arkansas.

[File endorsement omitted.]

APPEARANCE OF COUNSEL FOR APPELLEE—Filed Feb. 14, 1924

The Clerk will enter my appearance as Counsel for the Appellee,  
Edward J. White, Thomas B. Pryor.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ARGUMENT AND SUBMISSION—June 3, 1924

This cause having been called for hearing in its regular order, argument was commenced by Mr. Dave Partain for appellants, continued by Mr. Thomas B. Pryor for appellee and concluded by Mr. Dave Partain for appellants.

Thereupon, this cause was submitted to the Court on the transcript of record from the said District Court and the briefs of counsel filed herein.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed September 19, 1924

Mr. Dave Partain (Mr. G. C. Carter was with him on the brief), for appellants.

Mr. Thomas B. Pryor (Mr. Edward J. White was with him on the brief), for appellee.

Before Sanborn and Lewis, Circuit Judges, and Kennedy, District Judge

KENNEDY, District Judge, delivered the opinion of the Court.

This is a suit in equity brought by the Missouri Pacific Railroad Company, appellee here, in the District Court of the United States for the Western District of Arkansas, seeking to restrain the collection of assessments for highway improvements attempted to be put in force and effect by Road Improvement District No. 1 of Franklin County, Arkansas, and its commissioners, appellants here. The allegations of plaintiff's bill of complaint were met by answer of the Road Improvement District and its commissioners and the case proceeded to a final hearing upon which the trial court granted a permanent injunction against the collection of the assessment.

The decree of the trial court contains findings in substance that the assessment of the tax in controversy is illegal, unlawful and therefore unenforceable, in that the assessment against the property of the railroad company is erroneously placed upon a mileage basis in contra-distinction to the assessment against other real estate in the district which is upon an acreage area basis, making the assessment against the railroad company arbitrary and discriminatory and resulting in a denial to the defendant of equal protection of the laws; that no direct benefit on account of the construction of the highway would result to the railroad company, but that any benefit attempted to be shown was indirect, remote, doubtful and speculative in its nature; and that a purported agreement between the railroad and the commissioners attempting to fix the benefits upon a mileage basis, was void.

The Road Improvement District brings the case here on appeal, alleging error in the court's determination of the controversy as above outlined.

The Road Improvement District was organized under an act of the Arkansas Legislature, designating commissioners to have charge of the proposed improvements, which was to be assessed and paid for upon the basis of benefits to the real property of the district, and having for its general purpose the construction of a highway across the county of Franklin, shown to be part of a general plan of connecting the cities of Fort Smith and Little Rock in that state. While the highway does not exactly parallel the railroad, as the railroad follows more directly the course of the Arkansas River, both highway and railroad follow the same general direction through the county, for a distance of some 25 or 30 miles. The evidence shows that the commissioners with the aid of assessors, made the assessment within the district for the highway improvement which was originally to cost the sum of \$230,000.00. The amount assessed against the railroad property was first a little in excess of \$54,000.00 and when it was found that sufficient would not be raised by the first assessment to complete the highway, an additional assessment of approximately 40% was levied, making the railroad's entire share



of the assessment approximately \$75,000.00. Appropriate steps were taken by the railroad company in the courts to combat the assessment within the time fixed by the act of the legislature. The state legislature subsequently passed an act attempting to confirm the assessments as originally made against the property of the railroad company and others, and by a still later act, attempted to confirm the additional assessment. After the controversy, had arisen, an attempt was made by the railroad company and the commissioners to compromise by suggesting an assessment of \$250.00 a mile instead of approximately \$2300.00 a mile carried by the original assessment, but such compromise was never effected, apparently on account of some of the interested parties on the part of the District not being willing to accept it.

The evidence taken upon the hearing tends to show that while the assessment against the real property in the created district was upon an acreage value within certain designated distances from the highway, that the basis used for the assessment against the railroad was a mileage basis, or that used for general taxation purposes and which under the state system of taxation includes a certain portion of personal property. While those who had made the assessment, by their testimony attempted to show that they had considered the benefits which would accrue to the railroad on account of the highway improvement, no particular basis for arriving at the benefit was shown to have been adopted other than a mere arbitrary opinion of the assessors that it would be beneficial, and retaining solely as the basis of the assessment, the mileage of the railroad within the improved district. Numerous witnesses were introduced who testified to the fact that instead of the highway being a benefit to the railroad it would be a detriment owing to the increased motor traffic which would create an intensive competition over short hauls. Evidence was introduced through one witness on behalf of the Road Improvement District by which it was attempted to show that good highways would generally stimulate the traffic of a railroad, but in addition to this witness being somewhat repudiated, the evidence generally tends to show that while highways as feeders may be beneficial to railroads, yet those paralleling them cannot be considered as tending to stimulate railroad traffic, but have the contrary effect.

Inasmuch as the assessment contemplated by the act was to be upon the basis of benefits realized from the proposed improvement, the strong showing by the evidence that the highway improvement would be a detriment rather than a benefit to the railroad company and that any benefit accruing to the railroad would be so speculative as to be unascertainable, we are of the opinion that the trial court must be sustained.

The circumstances of this case seem to be fully and adequately covered by the language of the Supreme Court in the case of *Kansas City So. Ry. v. Road Imp. Dist. No. 6*, 256 U. S. 658, at page 660:

"The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area

and position and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system.

"Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to \$67,900.00 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415. It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

The highest court of the State of Arkansas has spoken through the case of *Board of Improvement v. Pollard*, 98 Ark. 543, at page 549, in the following language:

"The benefits must be special and peculiar and if there are no special and peculiar benefits the assessments cannot be made."

Neither can the plaintiff in error rely upon the contention that the temporary benefit to the railroad afforded on account of additional traffic incident to the building of the highway, should be considered. *Sebastian Bridge Dist. v. Missouri Pac. R. Co.*, 292 Fed. 345.

The plaintiff in error again contends that the acts of the legislature in attempting to confirm and validate the assessments place the matter beyond the control of the courts. But this rule does not apply where the assessment is arbitrary, unwarranted and reflects a confiscation of the property, as the trial court found from the evidence to be the case here. *Branson v. Bush*, 251 U. S. 182; *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710.

This court, in the case of *Thomas v. Kansas City Southern Ry. Co.*, 277 Fed. 708, uses the following language at page 711:

"While the Legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts."

There is no merit in the contention of plaintiff in error that the court should have ratified and approved an attempt to compromise, which compromise in fact was not effected prior to the institution of the suit.

The trial court sitting as a chancellor in this case has heard the conflicting evidence and made his finding thereon, which is presumptively correct, unless there is made to appear an obvious error of law or a serious mistake of fact. Road Improvement Dist. No. 2 v. Missouri Pac. R. Co., 275 Fed. 600, and cases there cited.

For the reasons stated, the decision of the trial court will be and is Affirmed.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE—October 6, 1924

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Missouri Pacific Railroad Company have and recover against Road Improvement District No. 1 of Franklin County, Arkansas, and Jerome Wilson, E. R. Prothero and Whit Martin, Commissioners, the sum of Twenty Dollars for its costs herein, to be collected according to law.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

The above mentioned Road Improvement District No. 1 of Franklin County, Arkansas, and M. B. Conatser, F. W. Greer and Jerome Wilson, Commissioners of said Road Improvement District No. 1 of Franklin County, respectfully show that a judgment and decree was rendered on the 29th day of September, 1924, in the above entitled cause by the above Court affirming the decree of the District Court of the United States for the Fort Smith Division of the Western District of Arkansas; that the matter in dispute exceeds One Thousand Dollars (\$1,000.00) besides costs and that the cause is one

involving the question whether certain statutes of the State of Arkansas are in conflict with the Constitution of the United States, and involving the question of whether an assessment of benefits against the property of the Appellee, Missouri Pacific Railroad Company, for the purpose of constructing and improving a highway is arbitrary, unwarranted and confiscatory under the constitution of the United States, and therefore proper to be reviewed by the Supreme Court of the United States *of Appeal*.

The said Road Improvement District No. 1 of Franklin County, Arkansas, and the said M. B. Conatser, F. W. Greer and Jerome Wilson, as such Commissioners, therefore pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Eight- Circuit to send the Record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith may be reviewed and if error be found corrected according to the laws and customs of the United States.

G. C. Carter, Dave Partain, Attorneys for Appellants.

Appeal allowed as prayed and bond for costs fixed at the sum of Five Hundred (\$500.00) Dollars.

December 11, 1924.

Walter H. Sanborn, U. S. Circuit Judge.

[File endorsement omitted.]

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## IN UNITED STATES CIRCUIT COURT OF APPEALS

### ASSIGNMENT OF ERRORS

The Appellants in the above entitled cause in connection with their Petition for appeal herein present and file herewith their Assignment of Errors as to which matters and things they say that the Decree entered herein is erroneous, to-wit:

First. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in holding that Act No. 626 of the General Assembly of the State of Arkansas of the year 1921 and Act No. 109 of the Special Acts of the General Assembly of the State of Arkansas of the year 1923 fixing, confirming and validating the assessment of benefits against the property of the Appellee, Missouri Pacific Railroad Company, as they apply to said railroad company, and each of them, are arbitrary, unwarranted and reflect a confiscation of the property of Appellee.

Second. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in holding that said Acts, and each of them, are in conflict with the Fourteenth Amendment to the Constitution of the United States.

Third. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in finding and holding that the assessment against the real estate of the Appellee, Missouri Pacific Railroad Company, is on a mileage basis and erred in its finding and holding that the assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway constructed and erred in finding and holding that this method of assessment, as confirmed and validated by said Acts of the General Assembly, is palpably, arbitrary and discriminatory and results in a denial to the railroad company of equal protection of the law.

Fourth. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in finding and holding that the highway improvement would be a detriment rather than a benefit to the railroad company and that any benefit accruing to the railroad would be so speculative as to be unascertainable.

Fifth. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in not finding and holding that the terms and provisions of the Act of the General Assembly of the State of Arkansas for the year 1923 being Act No. 109 approved February 12, 1923, fixing, confirming, establishing and approving the benefit assessed against the real property in the Appellant District including that of Seventy Five Thousand and Six Hundred and Eighty Six Dollars (\$75,686.00) against the real property of the Appellee is binding and controlling as a Legislative determination of benefits against the property in the Road District including that of the Appellee.

Sixth. That in any event the Circuit Court of Appeals for the Eight- Judicial Circuit erred in not holding and finding that the Railroad Company was at least liable for an assessment of Two Hundred and Fifty Dollars per mile which the Railroad had tendered and insisted in its Complaint and prayer for relief should be accepted as the basis of assessment against it.

Seventh. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in holding that the evidence in this cause fails to show that the railway company derives any benefit from the building of the road constructed by the Appellant, Road District.

Eighth. The Circuit Court of Appeals for the Eight- Judicial Circuit erred in holding that the plaintiff in error cannot rely upon the controlling as a Legislative determination of benefit against the account of additional traffic incident to the building of the highway should be considered.

Wherefore the Appellants pray that said judgement and decree of the said Circuit Court of Appeals for the Eight- Judicial Circuit be reversed and that the Appellant may have an adjudication and decree in their favor as herein specified.

G. C. Carter, Dave Partain, Attorneys for Appellants.

[File endorsement omitted.]

BOND ON APPEAL FOR \$500—Approved and filed December 26, 1924;  
omitted in printing

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CITATION—In usual form showing service on Thos. B. Pryor; filed  
December 27, 1924; omitted in printing

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# IN UNITED STATES CIRCUIT COURT OF APPEALS

## CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Road Improvement District No. 1 of Franklin County, Arkansas, et al., were Appellants, and the Missouri Pacific Railroad Company was Appellee, No. 6533, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the eighth day of December, A. D. 1924, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Western District of Arkansas.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of December, A. D. 1924.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal of United States Circuit Court of Appeals, Eighth Circuit.)

Endorsed on cover: File No. 30,817. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 852. Road Improvement District No. 1 of Franklin County, Arkansas; M. B. Conatser, F. W. Greer, et al., appellants, vs. Missouri Pacific Railroad Company. Filed January 19th, 1925. File No. 30,817.

Office Supreme Court, U. S.

FILED

FEB 20 1926

WM. R. STANLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925.

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN  
COUNTY, ARKANSAS; M. B. CONATSER, F. W.

GREER, ET AL., ..... *Appellants*

v.

No. 250. 38

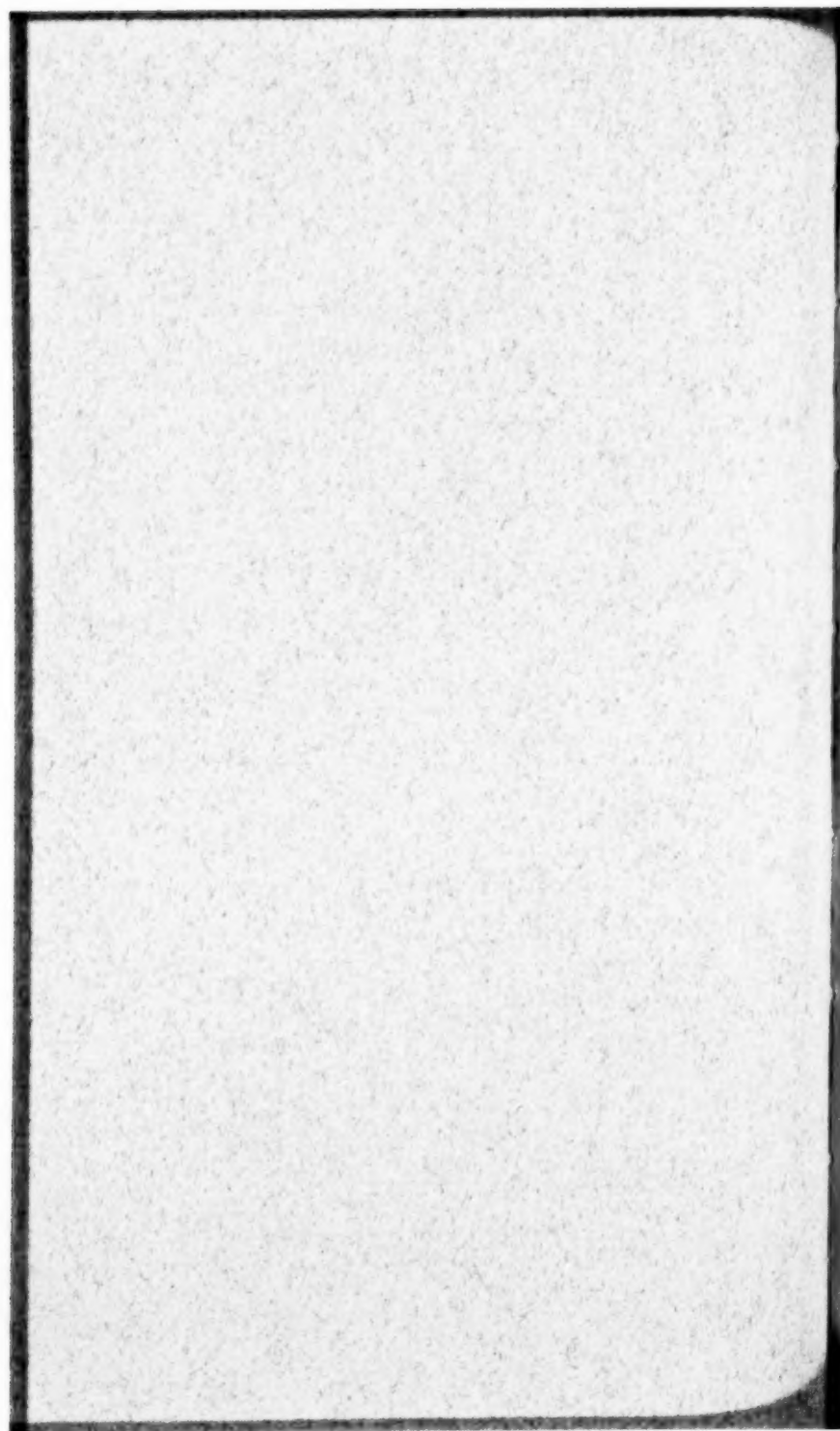
MISSOURI PACIFIC RAILROAD COMPANY ..... *Appellee*

APPEAL FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.

BRIEF FOR APPELLANTS.

HEARTSIL RAGON,  
*Attorney for Appellants.*

G. C. CARTER,  
DAVE PARTAIN,  
*Of Counsel.*





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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1925.

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ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN  
COUNTY, ARKANSAS; M. B. CONATSER, F. W.  
GREER, ET AL., ..... *Appellants*  
v. No. 250.  
MISSOURI PACIFIC RAILROAD COMPANY ..... *Appellee*

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APPEAL FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.

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BRIEF FOR APPELLANTS.

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JURISDICTION OF THIS COURT.

This is an appeal by Road Improvement District No. 1 of Franklin County, Arkansas, and the commissioners thereof from a decree of the United States Circuit Court of Appeals for the Eighth Circuit (R. 178-179). That decree and opinion which was rendered and filed September 19, 1924, (R. 174, 175, 176, 177, 178, and decree thereon entered Oct. 6, 1924, R. 178), (reported in 2 Fed. p. 340) affirmed a decree of the United States District Court, for the Western District of Arkansas, Fort Smith Division, rendered on the 26th day of April, 1923,

(R. 39, 40, 41) making permanent and perpetual a restraining order forever enjoining and restraining the said Road Improvement District No. 1, of Franklin County and the commissioners of same, and their successors, and those acting under them from collecting or attempting to collect a tax assessed and extended against the property of the appellee, Missouri Pacific Railroad Company, on an assessment made against it for the purpose of constructing and improving a highway within the limits of said road improvement district, and cancelling and setting aside said assessment, upon the ground that said assessment as made was palpably arbitrary and discriminatory, and resulted in a denial to the appellee of equal protection of the laws and was violative of the constitution of the United States. The amount in controversy exceeds one thousand dollars besides cost (R. 2).

This court has jurisdiction, and the appeal from the Circuit Court of Appeals was properly taken:

Judicial Code Sec. 241 (as existed prior to going into effect of act February 13, 1925).

*Huguley Mfg. Co. v. Galtton Cotton Mills*, 184 U. S. 290.

*Branson v. Bush*, 251 U. S. 182.

### STATEMENT OF THE CASE.

Road Improvement District No. 1 of Franklin County, Arkansas, is a special road improvement district, having been created by act No. 588 of the acts of the general assembly of the State of Arkansas at its regular 1919 session, for the express purpose of constructing and improving a certain highway through Franklin County. The act among other things provides for the construction of the highway, names certain commissioners to carry out its provisions, and provides for assessments of benefits against all real property and all railroads and tramroads, telegraph and telephone lines and pipe lines right-of-way situated within the limits of the district as defined by the act and provides the necessary machinery for the selection of an assessment board to determine and fix the assessment of benefits against all such property within the district; the said act contains a provision that any person or corporation aggrieved by any such assessment of benefits shall have twenty days after the assessment is finally made to start proceedings in any court of competent jurisdiction to contest same (R. 3, 4, 5, 6). Proceeding under

the terms of this act the contract for the building of the road, approximately twenty-four miles in length was let, assessors were appointed and benefits determined upon by them were duly assessed against all the lands, railroads, etc., within the boundaries of the district. This improvement district contains within its limits approximately forty-two miles of railroad track and right-of-way, as well as depot and other property belonging to the Missouri Pacific Railroad Company, and an assessment of benefits against this property of the appellee was fixed and determined upon by the assessment board in a total amount of \$54,082, while the total benefits assessed against all property in the district amounted to \$504,000 (R. 7).

The total assessed valuation of all real property within the district for the purposes of general taxation amounted to \$1,754,000, of which total amount \$711,325, represents the assessed valuation of the property of the Missouri Pacific Railroad Company in the district (R. 62). In making the original assessment of benefits the board of assessors took as a general basis as to all real property, including that of the railroad company, the assessed valuation for general taxation purposes and the location of the property in reference to the highway and considering the inequalities in assessment for general purposes with this as a starting basis formed their judgment as to the benefits that would accrue to the property by construction of the highway based upon the benefits that they found would accrue to each item of property, including that the railroad company (R. 110, 113, 114, 115, 116). As to the railroad property they considered that by reason of this improvement the country would develop more, there would be more settlements, more people come in and they would have to have material, building material and various things that would result in increased traffic to the railroad, and that the railroad would be actually benefited to the extent of the assessment, and benefited in its actual business of carrying freight and passengers, and that since the completion of the road there had been an actual increase from observation (R. 116, 117, 118, 119).

After this original assessment had been made and notice given of the fact, and a hearing had before the board of assessors, as provided in said act, and the said assessments against the property of the appellee made final, the appellee brought its suit in equity in the United States District Court for the Western District of Arkansas against the road district and its commissioners attacking the assessment upon various grounds, all of which appear to have been abandoned except

the contention that the assessment against the property of the appellee was unfair and palpably arbitrary and confiscatory, and amounting to a confiscation of property in violation of the fourteenth amendment to the constitution of the United States (R. 2).

Thereafter, at the 1921 session of the general assembly of the State of Arkansas, act No. 626, approved March 29, 1921, was passed. This act approved and confirmed the assessment of benefits originally made against the property of the appellee in the sum of \$54,062, as well as the assessments originally made against all other property in the district, and provided further for an increase in such assessments of benefits. In the meantime a proposition in writing was submitted by the railroad company to the commissioners of the district to pay the sum of \$250 per mile, making an approximate total of \$8,000, in full settlement of the assessment against its property. This proposition was tentatively accepted by the commissioners (99,100,101) but was not concurred in by the board of assessors. This proposition was made prior to the passage of the act of 1921.

Proceeding under the authority of this act, on account of certain changes in the improvement, and in order to raise funds therefor, the benefits against the said railroad property of the appellee were re-assessed, and made in the sum of \$75,686, and a corresponding re-assessment and change was made as to all other property in the district, and thereafter, by act 109, approved February 12, 1923, the general assembly of the State of Arkansas ascertained and found such re-assessment of benefits to be in all respects fair, equitable and proportionate, and fixed and established same as a legislative determination of benefits. This act was also attacked by the amended and substituted bill filed by the railroad company.

On the trial of the case in the district court it was the contention of the railroad company that the highway paralleled the railroad and on account of the use of automobiles and motor trucks would take traffic from it, and would become a detriment rather than a benefit, but the testimony introduced by it failed to disclose that condition. Several officials of the railroad, including members of the traffic department, were introduced as witnesses, and while they testified that the building of improved highways parallel to a railroad would take some traffic from the railroad on short hauls, yet they admitted that the construction of the highway would improve the country generally, and thereby result in an increased business for the railroad on its through traffic and

long hauls (R. 77, 82), and the testimony tended to show that these short hauls of which they would be deprived do not constitute profitable business for the railroad and are often carried at a loss (R. 86, 87).

The railroad company introduced as witnesses two of the three assessors who made the original assessment of benefits, and the three who made the re-assessment, and each of them testified that they made the assessment against the property of the railroad company on the same basis as all other property in the district and that in their judgment the railroad would be benefited in the amounts assessed against it ( R. 109, 115, 117, 123, 144, 149).

### SPECIFICATION OF ERRORS.

The assignments of error relied upon and urged by the appellants are as follows (R. 179, 180) :

First. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that act No. 626 of the general assembly of the State of Arkansas of the year 1921, and act No. 109 of the special acts of the general assembly of the State of Arkansas of the year 1923, fixing, confirming and validating the assessment of benefits against the property of the appellee, Missouri Pacific Railroad Company, as they apply to said railroad company, and each of them, are arbitrary, unwarranted and reflect a confiscation of the property of appellee.

Second. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that said acts, and each of them, are in conflict with the fourteenth amendment to the constitution of the United States.

Third. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in finding and holding that the assessment against the real estate of the appellee, Missouri Pacific Railroad Company, is on a mileage basis, and erred in its finding and holding that the assessment against other real estate is upon an area basis at a certain amount per acre, dependent upon distance from the highway constructed, and erred in finding and holding that this method of assessment, as confirmed and validated by said acts of the general assembly, is palpably arbitrary and discriminatory and results in a denial to the railroad company of equal protection of the law.

Fourth. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in finding and holding that the highway

improvement would be a detriment rather than a benefit to the railroad company, and that a benefit accruing to the railroad would be so speculative as to be unascertainable.

Fifth. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in not finding and holding that the terms and provisions of the act of the general assembly of the State of Arkansas for the year 1923, being act No. 109, approved February 12, 1923, fixing, confirming and establishing the benefits assessed against the real property in the appellant district including that of seventy-five thousand and six hundred and eighty-six dollars against the real property of the appellee is binding and controlling as a legislative determination of benefits against the property in the road district, including that of appellee.

Sixth. That in any event the Circuit Court of Appeals for the Eighth Judicial Circuit erred in not finding and holding that the railroad company was at least liable for an assessment of two hundred and fifty dollars per mile, which the railroad had tendered and insisted in its complaint and prayer for relief, should be accepted as the basis of assessment against it.

Seventh. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that the evidence in this cause fails to show that the railway company derives any benefit from the building of the road constructed by the appellant, road district.

## ARGUMENT.

We think that the several specifications of errors herein can be covered by a brief argument of the following propositions:

(a). The basis of assessment against the property of the railroad, as made by the assessing authorities of the ditrict, was fair and reasonable, and was upon the same basis as that of other real property in the district. The only discrimination appearing to have been made in favor of the railroad company.

(b). The benefits were fixed and determined by the legislature of the State of Arkansas, and the proof does not show that this assessment, as made against the property of the railroad company, was palpably arbitrary and amounts to a mere confiscation of property so as to entitle the appellee to the injunctive relief sought herein.

(c). That the contention of the railroad company that the highway constructed paralleled its line of railway and will operate as a competitor to it, and therefore not be a benefit but a detriment, is not supported by any fact in the record, but on the contrary it is conclusively shown that it will be a benefit, and that the railroad will enjoy a general increase in its profitable business that will much more than offset its loss of short hauls, if any, which are shown to be unprofitable and upon the whole undesirable.

(d). That in no event should the property of the railroad company be permitted to entirely escape taxation for this public improvement, and if the assessment as made and determined upon by the assessing authority of the district and confirmed by the legislature is found to be excessive, the same should be reduced to a just and reasonable basis.

## THE BASIS OF ASSESSMENT.

It is our contention that the legislative determination of benefits is controlling in this case and that whatever error of judgment or otherwise that may have been made by the assessing authorities of the district in originally fixing the benefits to accrue to the property of the railroad by the construction of the highway is cured thereby yet we first wish to call the court's attention to the basis upon which this assess-



ment was made as disclosed by the undisputed proof in the record.

We are unable to find any view under which the finding of the District Court, for the Western District of Arkansas, in its finding No. 2, which was sustained by the opinion of the Circuit Court of Appeals (R. 40), that the assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre, dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws." The only testimony upon this proposition is that of the members of the respective assessing boards, who were introduced as witnesses by the railroad company. The testimony of each of them, without exception, was that the assessment against the railroad and the other real estate of the district was made upon the same basis, and that in fixing the assessment of benefits against farm lands and town property they did not use an area basis to fix it at so much per acre, but that they took as their general basis for fixing the benefits the valuation of the property as it was shown upon the tax books for general taxation purposes, and considering the improvements upon the land and its proximity to the highway, they fixed the assessments at what they, in their judgment, were convinced the benefit would be to each respective tract. That they did not take this valuation as shown by the tax books as an absolute basis, but that they were familiar with the lands of the district and the improvements thereon, and in the exercise of their judgment, if they found that the tax books did not reflect the true value, they placed a correct valuation either higher or lower, upon the land and improvement for the purpose of determining the benefits. That in fixing the benefits against the railroad property they accepted the same basis of value as shown by the State Tax Commission, which as applied to railroad property was the assessing authority. That exercising their best judgment and discretion, it was their opinion, when fixing the benefits, and when testifying that the property of the railroad company would be benefited the amount assessed against it, and that the assessment was just and fair, and for that reason they made it. This was the effect of the testimony of the members of the assessing board: Will Hill (R. 109, 117), John Mosley (R. 115), Ed B. Melton (R. 123), John T. Donald (R. 144), C. E. Horton (R. 149).

Will Hill, one of the assessors, testified (R. 110):

“Q. Mr. Hill, I wish you would state to the court by what process you arrived at the assessment of benefits against the property of the Missouri Pacific Railroad?

A. We taken the collectors book as a guide for the valuation of the taxes of the county.

Q. But the tax books as shown by the books in the hands of the collector, the assessment for general taxation purposes was the basis upon which the benefits were assessed?

A. Yes sir, that was our basis for a guide.

THE COURT: Mr. Hill, you took the tax books, as I understand, and ascertained what a particular piece of land was assessed at for general tax purposes, State and county?

A. Yes sir.

Q. Now if you conceived that that land was not assessed for those purposes at a sufficient valuation you raise it?

A. Yes sir.

Q. In order to apply the benefits?

A. Made a fair equalization of the assessments as we considered.

Q. Did you lower any of the valuations?

A. Just in a few instances. We found a few tracts that was a little excessive we thought.

Again this witness testified (R. 113):

Q. The real property of the railroad company then was assessed in the same way that the real property of the other property in the district was assessed for benefits according to the zone that it occupied?

A. Yes sir, with this exception. We did not change the valuation of their property.

And again (R. 114):

Q. Now Mr. Hill, did you, assisting the board, exercise your best judgment and discretion about these assessments and arrive at that in the way you did, and make these assessments, believing them to be fair and equitable of the benefits received?

A. We did.

Q. Was it your opinion, and is it your opinion that the assessment of benefits made by your board against the property of the railroad company is just and fair?

A. We thought so.

Q. And for that reason you made it?

A. Yes sir.

Q. Believing in your opinion that it would receive that amount of benefits?

A. Yes sir.

This is substantially the testimony of the other assessors, John Mosley, Ed B. Melton, John T. Donald and C. E. Horton. The testimony of these witnesses, the only ones to speak upon the subject at all, is clear and positive that no lands or property in the district were assessed upon an "area basis at a certain amount per acre." We submit therefore that there is no fact in proof from any witness upon which the finding of the district court that this was done, could possibly be sustained.

In its finding No. 1, the district court found that "the assessment against the property of the railroad company includes personal as well as real property, the inclusion of personal property is unlawful." It is true that there was some testimony tending to show that of a total assessment of \$711,325, as shown by the assessment for general taxation purposes against the railroad, the amount of \$52,465 was on personal property or rolling stock, and this might have called for a proportionate reduction of the benefits if it were not for other facts to which we wish to call the court's attention.

In the first place as shown by the record, and as computed by the plaintiff's engineer, Mr. Warden, in his testimony, the total assessed valuation of all real property in the district was \$1,754,000, and that of this total valuation \$711,325 belonged to the Missouri Pacific Railroad Company (this valuation of the railroad's property at \$711,325 included the \$52,465 claimed by it to be personal property), showing that the railroad company on this basis owned 41.7 per cent of the total of all the property in the district. That the total amount of all benefits assessed against this \$1,754,000 total valuation was \$575,421.35; that of these benefits an amount of only \$75,686 was assessed against the property of the railroad company, that is only 13.2 per cent of the total benefits assessed against all of the property of the district was assessed against the property of the railroad company (R.

61, 62, 63). A further computation on this basis shows that the railroad company was only assessed benefits totaling approximately 10.6 per cent of the total assessed value of its property in the district, while all other property in the district was assessed an average of approximately 47.7 per cent of its assessed valuation, so, allowing for any deduction that should be made by reason of the small item in these figures claimed by the railroad to be personal property, it would still leave the benefits assessed against the railroad's actual real estate within the district, less than 25 per cent of the average benefits assessed against all other real property in the district. In this connection the testimony shows that the property of the railroad company is assessed for the purpose of general taxation at about 50 per cent of its actual value, and that the other real property in the district is assessed at from 35 to 65 per cent of its actual value, or an average of approximately 50 per cent.

In the case of *Saint-Louis-San Francisco Railroad Company v. Sebastian Bridge District*, an Arkansas case, decided by the Circuit Court of Appeals for the Eighth Circuit on September 14, 1923, in error to the District Court of the United States for the Western District of Arkansas, 293 Fed. p. 729, the court of appeals said:

"The statute required the assessment to be made upon the basis of actual benefits. The evidence is overwhelming that the method pursued by the assessors is as follows: They regarded the bridge as a benefit to the entire district and all of the real estate in it, in an amount equal to the cost of the bridge. That without any consideration of benefits to particular tracts, and ignoring any differences or consideration of position, location, relation to the improvement or usage, they determined the actual value of all real estate tracts, and then declared a benefit of 10 per cent thereon—the actual assessment being slightly over 41 per cent of this benefit; in short, they estimated 'the community benefit' to equal the cost, and then spread this benefit horizontally on all the real estate in the district on the basis of the value of such property. Undisputed testimony was that proximity to the bridge would affect the benefit therefrom. There was not the slightest attempt to separately consider and determine benefits to particular tracts or to tracts in particular localities. It is clear therefore that the method of assessment required by the act was not followed, but that the assessors, with good intentions, but none the less erroneously, adopted and carried out a different method of

their own. They had no authority to do otherwise than as the legislature had directed them. All of their power came from the act creating the district, and they must stay within such granted powers.

"But does this conclusion necessitate a reversal of the case? Such a decision could affect only the right of this plaintiff in error. Others who have been assessed and are not contesting the assessment can waive the illegality thereof, and this contestant is not concerned therewith, and has no right to demand a re-assessment of such other lands.

"Courts should refuse to decide constitutional points unless the party raising them is injured by the threatened action, which is claimed to be invalid. Here the railway is not discriminated against because it was actually assessed upon the same basis and the same rate as all other real estate, and the jury found as a matter of fact that no discrimination against this plaintiff in error existed. See *Milheim v. Moffat Tunnel Improvement District*, 43 Sup. Ct. 694, decided by the supreme court on June 11, 1923 on the last point (appraisal of benefits) discussed therein. Also it was not injured by the fact that it with all others was assessed upon an erroneous basis, since the jury has found that the actual benefits (which was the proper assessment basis) equals the benefits found under the erroneous method. Again, if we ordered simply that the assessment of this railway be according to the actual benefits as required by the act, the result would clearly be the same as has been reached here, since two of the three assessors have expressed in this record their conviction that the benefits equaled this assessment.

"It is also clear that this plaintiff in error could not and should not entirely escape assessment for this improvement. Even if the method of assessment was so erroneous, because not the one required by the act, as to vitiate any possible assessment of this railway under the existing law, yet the legislature could rectify this by requiring re-assessment of this property. Citing *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, and other cases. In view of the foregoing, we should as to this point, decline to consider the constitutional question, because no injury is shown, and an order would be of no practical benefit to this objector."

In the above case the assessors of the bridge district took as a basis the assessment for general taxation purposes

made by the State Tax Commission, as did the assessors in the instant case. The Circuit Court of Appeals found that there were certain errors in taking this basis, and modified the assessment to that extent.

We submit that in the case at bar the assessing authority, as shown by the undisputed testimony, used the same basis for fixing the assessment of benefits against the railroad property as against the other property in the district, with the exception that the property of the railroad company was assessed at a much less proportionate figure than that of the other property, and if any discrimination is shown it is in favor and not against the railroad, and it is no attitude to complain. Each of the assessors put upon the stand by the appellee testified that, exercising their honest judgment, the benefits accruing to the railroad equaled the amount of the assessment.

#### THE BENEFITS FIXED BY LEGISLATIVE DETERMINATION.

Under the issues involved here we do not deem it necessary to set out the original act No. 588 of the acts of the general assembly of the State of Arkansas for the year 1919, creating and establishing the appellant, improvement district, as it is quite lengthy, and there is at this time no question of its validity involved. It is sufficient to say that this act provided for the construction of the improvement and directed and assessment of benefits therefor against the "lands, railroads, tramroads, telegraph lines, telephone lines and pipe lines within the district—". However, the legislature of the State of Arkansas, at its 1921 session, passed act No. 626, which act is to be found at pages 1255-1259 of the official volume of the special acts of that session, the same being approved March 29, 1921. So much of said act as is applicable to the question here reads as follows:

"Section 1: That the assessments of benefits heretofore made in Road Improvement District No. 1 of Franklin County, under the terms and provisions of act No. 588 of the acts of the general assembly of the State of Arkansas for the year 1919, approved April 1, 1919, and approved by the county court of Franklin County on the 9th day of August, 1919, be and the same is hereby found to be fair, equitable and just as made, and is hereby in all things confirmed, and declared to be the benefits accruing to the property therein assessed by reason of the improvement as contemplated at that time. The same

being as against the Missouri Pacific Railroad Company, the sum of fifty-four thousand and sixty-two (\$54,062.00) dollars; Western Union Telegraph Company \$625.00; Home Telephone Company \$500.00; Commonwealth Public Service Company \$3,125.00; Sanbeau Mine \$250.00; Denning Domestic Coal Company \$250.00; Meece & Hackney Coal Company \$375.00; Mansfield & Kindrick Coal Company \$500.00; Dodson Mine Nos. 1 and 2, \$750.00; Western Coal & Mining Company Mines Nos. 2 and 6, \$750.00; Denning Coal Company \$625.00; Ozark Coal Company \$250.00; Harbottle Biley Coal Company \$188.00; Liberty Coal Company \$125.00; Wallace & McKinney Coal Company \$375.00; Southwestern Bell Telephone Company \$1,000.00; Alis Gin Company \$313.00; and as against the several tracts of land not herein specifically mentioned as shown on said assessment as filed and approved as aforesaid."

Section 2 of this act provides for a re-assessment of benefits in the event it should become necessary by reason of the widening of the road or otherwise. Which re-assessment was found necessary, and made by the assessors, and amounted to an increase of practically forty per cent against all the property of the district, and thereby increasing the assessment against the property of the railroad company to \$75,686. This re-assessment was made necessary by reason of changes in the original plan of improvement, widening the road and otherwise, which resulted in a material increase in the cost (R. 134, 135). Thereafter at the 1923 session of the State legislature, another bill was passed for the relief of this road district. This act was approved by the governor and became a law as act 109, on February 12, 1923, and is to be found on pages 205-209 of the official volume of the special acts of the 1923 session of the general assembly. So much of this act as it is pertinent here is as follows:

"Section 1. That the creation, formation and establishment of Road Improvement District No. 1 of Franklin County, Arkansas, under and by virtue of the terms and provisions of act Number 588 of the acts of the general assembly of the State of Arkansas for 1919, approved April 1, 1919, be and the same is hereby in all things confirmed, validated and approved.

"Section 2. That the assessment of benefits as against the several and particular tracts of land, railroads and tramroads, telegraph lines, telephone lines, electric lines and pipe lines, in said district, as re-assessed under the terms and provisions of act No. 626 of the acts of the general assembly of the State of Arkansas for the year 1921, approved March 29, 1921,



the same being entitled 'An act for the relief of Road Improvement District No. 1, of Franklin County, for Confirming the assessment of benefits therein, and providing for changes therein, and providing for a referendum therein, and for other purposes', and filed in the office of the county clerk in and for the Ozark District of Franklin County, as of the 20th day of October, 1921, be and the same is hereby found and declared to be fair, just, equal and proportionate; the said re-assessment of benefits is further found to be based upon the improvement in said district as at that time planned and laid out, and as finally made, and said re-assessment of benefits is hereby fixed, confirmed, approved and established and declared to be the assessment in and for said district and to be the benefits that have and will accrue to the property therein assessed by reason of the improvement as contemplated at the time of making and filing such re-assessment, and as finally made.

"Section 3. It is hereby, by the general assembly, ascertained and found that said re-assessment of benefits, as filed on the 20th day of October, 1921, and as same now appears upon the assessment roll and books of said district, showing said re-assessment, and being as against and upon the railroad, track, right-of-way, switches, sidetracks, and other real property connected therewith, and located in said district, of the Missouri Pacific Railroad Company, the sum of \$76,686.00 (seventy-five thousand six hundred and eighty-six and no one-hundredths dollars); the electric lines, poles, substations, easements right-of-ways, and other interest in real property of the electric lines in said district, now held and operated by the Mississippi Valley Power Company, the sum of \$4,375.00 (four thousand three hundred seventy-five and no one-hundredths dollars); and as against and upon all other tracts of land, railroads and tramroads, telegraph lines, telephone lines; electric lines and pipe lines, within said district, not herein specifically mentioned, as same appears and is shown to be re-assessed upon said assessment roll and books, is in all respects fair, equitable and proportionate, and to be based upon the improvement as made in said district; and same is found in each particular instance to be the benefit accruing, by reason of such improvement, to each tract of land, railroad, tramroad, telegraph line, telephone line, electric line and pipe line within said district; and said re-assessment of benefits is by the general assembly hereby fixed, established and declared to be the assessment of benefits in and for said improvement district.

"Section 4. That said re-assessment, hereby made and fixed as the assessment of benefits in said district, shall not



be set aside or declared void by any court on account of any defect in description of property or naming the owner thereof, irregularity in the proceedings, or any former action of any board of commissioners or assessors, and this act shall be liberally construed so as to make the lien of the said assessment valid and prior to other liens."

It is affirmatively shown from the record that all requirements of the State constitution as to the giving of notice of the intended introduction of this bill and the exhibition of the notice in the general assembly were fully complied with (R. 162, 163, 164, 165).

The district court did not undertake to find that the legislative determination of benefits against the property of the appellee, under the provisions of these acts, was wholly unwarranted, a flagrant abuse of authority or confiscatory; but merely found that the method of assessment employed by the assessing board of the district was arbitrary and discriminatory because made upon a different basis from that used in assessing other real property in the district. This finding as we have contended and argued heretofore, is itself clearly against the manifest weight of the evidence; but what ever may have been the course of action or conduct pursued by the board in making the assessment, we maintain that the act of the legislature of the State of Arkansas fixing, establishing and confirming an assessment of benefits definitely and specifically fixed in the act itself is controlling here and must be given full effect under numerous decisions, not only of the Supreme Court of the State of Arkansas but this court as well, unless it is affirmatively shown that the legislature in fixing the assessment acted arbitrarily and capriciously in such a manner as to cause the assessment against complainant's property to amount to mere confiscation. This well established rule was laid down by this court in the case of *Branson v. Bush*, 251 U. S. 182, 189, and has since been generally followed. In the case of *Milheim et al v. Moffat Tunnel Improvement District et al.*, 262 U. S. 710, 43 Sup. Ct. 694, the court, speaking through Mr. Justice Sanford, said:

"It is well settled however, that if a proposed improvement is one which the State has authority to make and pay for by assessments on property benefited, the legislature, in the exercise of the taxing power, has authority to determine by the statute imposing the tax what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the court, and cannot be

assailed under the 14th amendment unless it is wholly unwarranted and a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property."

In the case now before the court the legislature, in the original act creating the district, determined what property would be benefited, including the railroads. After the assessment was made, the legislature passed an act confirming it and specifically finding that the assessment as fixed, was in each instance the benefits accruing to each respective item of property. The legislature could have originally fixed the assessment of benefits, and with the same force and effect could fix or confirm an assessment already made, and the mere fact that an assessing board may have made a mistake in judgment, or used an erroneous basis for making the assessment against any portion of the property, would in no wise affect the validity and force of the legislative determination or confirmation. This rule has been given effect in many cases by the Supreme Court of Arkansas. In the cases of *Tims v. Mack* and *Mason v. Mack*, 147 Ark. p. 112, the court said:

"We have held in a long line of cases, beginning with *Sudberry v. Graves*, 83 Ark. 344, that the lawmakers, in providing for assessments upon land for the construction of local improvements, 'may act directly, determining the area to be benefited, and the rate of apportionment, or may levy assessments directly, fixing the amounts and determining the benefits to accrue, and that the determination of the legislature in these matters will be respected by the courts,' and that the ratification by the legislature of assessments already made is tantamount to an assessment made by the legislature itself. We held in those cases that the legislative determination was not subject to review by the courts for mistakes of judgment, but that only an arbitrary abuse of the power would be controlled (citing cases).

The theory on which these decisions is based is that the lawmakers have in their own way ascertained and determined the facts, and their decision is conclusive upon the courts, unless it appears that such decision, is on its face, arbitrary and demonstrably erroneous. The legislature may adopt its own method of ascertaining the facts. It is not bound by any fixed rules of evidence in conducting the inquiry. It cannot therefore be said that it was physically impossible for the legislature to have inquired into the facts in regard to the correctness of the assessment of benefits made by the board of assessors.

It is not proper for us to make inquiry into the method by which the members of the legislature satisfied themselves as to the correctness of these assessments, but we conclusively presume that they did make such inquiry."

In the case of the *Kansas City Southern Railway Co. v. Road Improvement District No. 3, Sevier County*, 156 Ark. Sup. Ct. Reports p. 116-119, the Supreme Court of Arkansas said:

"An affirmance of the judgment in this case might be rested entirely on the confirmation of the assessments by the statute cited above (being an act confirming assessment of benefits previously made), there is no reason shown why the statute is not applicable, for we have decided that even during the pendency of litigation a statute may be enacted ratifying and confirming assessments (citing cases). This statute constitutes a legislative determination of the correctness of the assessment, and that decision will not be overturned unless found to be obviously and demonstrably erroneous."

The judgment of the Arkansas Court, in this case, was affirmed by this court on the 15th day of December, 1924, 45 Supreme Court Reporter 136, 140. Mr. Justice Van Devanter, in delivering the opinion said:

"By a long line of decisions in this court it has been settled that, where the State constitution as construed by the State court of last resort does not provide otherwise, the legislature of a State may require that the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited and charged against them according to their value, their area, or the benefits which they will receive; may itself determine what lands will be benefited, and what proportion they will share in the benefits; and may avail itself, for the purpose of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process clause of the fourteenth amendment (citing a long list of cases). And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of that amendment. *Kansas City Southern Ry. Co.*

*v. Road Improvement District No. 6*, 256 U. S. 658, 41 S. Ct. 604, 65 L. Ed. 1151; *Thomas v. Kansas City Southern Ry. Co.* 261 U. S. 481, 43 S. Ct. 440, 67 L. Ed. 758.

“To justify an assessment of benefits to particular lands it is not essential that the benefits be direct or immediate. *Valley Farms v. Westchester County supra*. But is essential that they have a better basis than mere speculation or conjecture. In the case of railway property they may consist of gains from increased traffic reasonably expected to result from the improvement. *Thomas v. Kansas City Ry. Co., supra*; *Branson v. Bush, supra*.”

In the above case the railroad had only two miles of main line, nine miles of sidetrack and depot and other buildings within the road district, the assessed valuation for general taxation purposes of which amounted to only \$129,615, and benefits were assessed and approved against this property and valuation amounting to \$21,270, or approximately 16 per cent of its total assessed value. While in the case at bar the appellee has within the limits of the district a total mileage of approximately forty miles as well as depot and other necessary buildings, of an assessed valuation of in the neighborhood of \$700,000, and is assessed total benefits of less than 11 per cent of its assessed valuation and less than 14 per cent of the total benefits assessed in the entire district notwithstanding the fact that it owns more than 47 per cent of the total assessed valuation of property therein. Surely it can not be successfully urged that in view of these undisputed facts that the legislative determination of benefits against the property of the Missouri Pacific Railroad Company is wholly unwarranted and a flagrant abuse, or by reason of its arbitrary character, a mere confiscation of the property assessed, so as to offend against any provision of the constitution of the United States. To the contrary such is the character of proof as made out by the testimony, offered in the trial court, on the part of the appellee that we are convinced that even in the absence of the legislative determination the assessment, or at least a portion of it, should be permitted to stand. Not a witness introduced but who admitted that the railroad would be benefited by the building and improving of the highway. True a number of witnesses connected with the traffic department of the railroad testified that in some instances where hard surfaced highways had been built paralleling a railroad it had resulted in a loss of some traffic in small packages and on short hauls; but they all conceded that the building of the highway and the resultant upbuilding and improvement of the country would of necessity bring an ultimate increase of gen-

eral business of the railroad, which it appears from the testimony, would far more than offset whatever loss might be sustained in reference to small business and short hauls. In fact it is strongly indicated from the testimony of C. E. Carstarphen, division agent of the Missouri Pacific Railroad Company for thirty-five years, and having direct charge of traffic, that these short hauls are unprofitable business to the railroad company, and are carried frequently at a loss, incidentally to their general and more profitable business (R. 86, 87, 88).

Q. The long hauls can be carried much more cheaply in proportion than the short hauls can they not?

A. They are, yes.

Q. Those short hauls and this short transportation are expensive hauls to the railroad company are they not?

A. Yes sir.

Q. So that they are not regarded profitable to the company, are they?

A. Yes, we like that business very well.

Q. But you often do it at an expense in order to keep up your general through business?

A. Well, probably so yes.

Q. You carry freight between local points frequently at probably a loss to that particular business, but it is to keep up your general business?

A. I think so.

Q. Let me ask you this question: The building of a highway, that is, a good road in a community, helps the development of the country?

A. Yes sir.

Q. Well, whatever helps to benefit the community helps to benefit the railroad?

A. It should, yes sir.

Q. It does, doesn't it?

A. I don't know that it would increase their local business any.

Q. I am not talking about the local business. I am talking about the business that it does as a common carrier of

freight and passengers from all points it serves, to all the points it serves?

A. Well, I would say yes.

Q. If the country is developed that is served by the railroad then that necessarily inures to the benefit of the railroad in the way of business, doesn't it?

A. Yes sir.

Q. If the line of road other than the railroad which helps to develop a country parallels the railroad, it may take away some local business, but it helps develop the country and thereby benefits the railroad in its general business, doesn't it?

A. Yes sir.

Thus it will be seen that the railroad company, after having exhausted all of its available testimony from its skilled and experienced engineering and traffic department to support its attack upon this assessment, has been able to show at most only a probable loss of a portion of its unprofitable business. Surely it cannot be said that this was sufficient an attack under the 14th. amendment, and especially so when further taking into consideration the fact that the employees of the plaintiff's traffic department that undertakes to give an opinion upon the subject at all, admit that the building of this highway will result in the upbuilding and improvement of the community served by the railroad, and in turn, as a natural consequence, result in a general increase in the business of the railroad, at least upon its longer and larger hauls and more profitable business.

Aside from its own employees, every witness that the railroad introduced positively testified that the building of the highway would result, not only in a general improvement of the country but in the business of the railroad as well, and that in their opinion the railroad would be benefited fully as much as the assessment against it. Such is the effect of the testimony of J. S. Turner (R. 99, 192), M. B. Contaser (R. 103, 106), Will Hill (R. 109, 115, 117, 122), John Mosley (R. 115, 117), Ed B. Melton (who was at the time of testifying and had been for many years an employee of this railroad company and also one of the assessors for the district) (R. 123-129), John T. Donald (R. 144-148), C. E. Horton (R. 149-155); each one of these witnesses was introduced by the railroad company and each of them gave it as his opinion, based upon facts detailed by them, the railroad company would be benefited at least as much as the assessment of benefits made

against its property. Some of them testified that these benefits were already apparent, that from observation the railroad was doing a bigger business within the district, and that the country generally was rapidly improving; orchards were being put out, and fruit of which would be transported by the railroad; many new buildings were being erected, the material for same being hauled by the railroad; all due to the building and improving of this highway. That large acreage of berries were being planted along the highway, and the community being otherwise improved and advanced by reason thereof. That as a direct result of the building of this highway, lateral roads were being constructed leading from the interior to this road and from there into the various stations and shipping points along the Missouri Pacific Railroad. And it was further shown that the railroad company had received in freight for material used in the construction of this road a sum of money almost equal to the total assessment against it (R. 131).

### PARALLEL HIGHWAY.

Much stress is placed by the appellee upon the fact that the highway improved and constructed by the district is parallel to its line of railway. It is clearly shown (R. 129-144) that the effect of this highway, while it parallels the railway at places, is not that of a parallel road; that neither to the east nor the west was there a connecting improved highway. That this highway served and would serve all the purposes of a feeder to the various stations and shipping point of the appellee within the district. That from it laterals were being constructed into an extensive and fertile timber region to the north; that already a mill had been started and a development of this great industry which would furnish large quantities of freight to the railroad was under way. That along the highway large acreage of fruits and berries were being planted, the products of which would of necessity be transported at least to a large extent over this railroad.

It is conceded that one of the greatest agencies for the development of any country or community is that of good roads. It cannot be successfully urged that if a community is developed and improved, it will not in turn improve and increase the business of the railway which serves that particular community. It goes without saying that no company of capitalists would for a moment consider investing their money in the building of a railroad which would lie wholly within a desert or barren waste, unless they had immediate prospects



of a development and improvement of the country which their road traversed. It is only as the adjacent territory by its improvement, development and industry grows and expands in wealth and thereby makes increasing demand upon transportation facilities that the railroad can flourish and prosper.

If it be said that the highway constructed by the district parallels the line of the appellees railway, then we answer that the only effect of this as shown by the testimony in this case and as established by experience, is to develop, improve and increase the prosperity of the community adjacent to the highway and railroad, and thereby necessarily result not in "an indirect, remote, doubtful and speculative benefit" to the property of the railroad company, but, as shown by the testimony and admission of the employees of the appellee's traffic department, as well as other testimony in the case, will result in an actual, direct, substantial and ever-increasing benefit, with the possible loss in small business and short hauls far more than offset by the continuing growth of the railroads general and more profitable business.

#### IN NO EVENT SHOULD PROPERTY OF THE RAILROAD COMPANY WHOLLY ESCAPE TAXATION FOR THIS PUBLIC IMPROVEMENT.

We have urged some of the reason why we believe that the benefits as originally fixed by the assessing authorities and later fixed and confirmed by legislative determination should be permitted to stand as against the attack made upon them in this suit but we further submit that in the event the court should find that the benefits as fixed are excessive, that in that event they should be reduced to a just and reasonable basis and the property of the appellee required to at least bear some portion of the burden of taxation for this public improvement. We insist that under the record in this case the language used by this court in the case of *Kansas City Southern Ry Co. et al. v. Road Improvement District No. 3 of Sevier County, supra*, is peculiarly applicable:

"The evidence, as before outlined, falls short of showing that the assessment against the railway property was either palpably arbitrary or unreasonably discriminatory. The burden was on the railway companies to overcome the presumption attending the legislative determination, and this they failed to do; for, under the evidence produced, it is an entirely admissible view that the railway property will be substantially benefited by



the road improvement, and that the benefits are fairly assessed as between that property and the farm lands and town lots. True, the amount of benefits which will accrue to the railway property is largely a matter of forecast and estimate; but the same thing is true of the farm lands and town lots, and also of benefit assessments in general."

With this very apt statement of the situation in every case of benefit assessments for a public improvement of this character in view: That is that it is "largely a matter of forecast and estimate" we submit that upon that basis it can after all be better and more definitely determined that a railroad will receive a measure of benefit than many other classes of property that are assessed on a much higher proportionate basis than the railroad in this instance. At least there is the tangible proposition of increased traffic that will unquestionably inure to the railroad by reason of the construction of a public highway whether it be parallel or otherwise while as to farms and town lots situate at a remote distance from the highway it is difficult indeed to find a substantial basis upon which to say that they will be directly benefited yet they must in proportion bear a heavier burden of taxation than the railway. We therefore submit that the legislative determination of benefits in this case against the property of the Missouri Pacific Railroad Company should be permitted to stand as fixed—less than 25 per cent of the average benefits assessed against all other real property in the district—or in any view of the case some substantial assessment should be upheld against this property owner and in any event that the decree herein should be reversed.

Respectfully submitted,

HEARTSIL RAGON,

*Attorney for Appellants.*

G. C. CARTER,

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*Of Counsel.*

Office Supreme Court, U. S.

FILED

MAR 16 1926

WM. R. STANSBURY

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1925

ROAD IMPROVEMENT DISTRICT  
NO. 1 OF FRANKLIN COUNTY,  
ARKANSAS, M. B. CONATSER,  
F. W. GREER, ET AL.....Appellants  
vs. ~~No. 250~~ 38

MISSOURI PACIFIC RAILROAD  
COMPANY ..... Appellee

Appeal from United States Circuit Court of Appeals  
for the Eighth Circuit.

**STATEMENT AND BRIEF FOR APPELLEE**

EDWARD J. WHITE,  
THOMAS B. PRYOR,  
*Attorneys for Appellee*



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vs.

No. 250

MISSOURI PACIFIC RAILROAD  
COMPANY ..... Appellee

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**STATEMENT AND BRIEF FOR APPELLEE**

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**S T A T E M E N T**

The Circuit Court of Appeals in its opinion says:

“The Road Improvement District was organized under an act of the Arkansas Legislature, designating commissioners to have charge of the proposed improvements, which was to be assessed and paid for upon the basis of benefits to the real property of the district, and having

for its general purpose the construction of a highway across the county of Franklin, shown to be part of a general plan of connecting the cities of Fort Smith and Little Rock in that state. While the highway does not exactly parallel the railroad, as the railroad follows more directly the course of the Arkansas River, both highway and railroad follow the same general direction through the county, for a distance of some 25 or 30 miles. The evidence shows that the commissioners with the aid of assessors, made the assessment within the district for the highway improvement which was originally to cost the sum of \$230,000.00. The amount assessed against the railroad property was first a little in excess of \$54,000.00 and when it was found that sufficient would not be raised by the first assessment to complete the highway, an additional assessment of approximately 40% was levied, making the railroad's entire share of the assessment approximately \$75,000.00. Appropriate steps were taken by the railroad company in the courts to combat the assessment within the time fixed by the act of the legislature. The state legislature subsequently passed an act attempting to confirm the assessments as originally made against the property of the railroad company and others, and by a still later act, attempted to confirm the additional assessment. \* \* \*

"The evidence taken upon the hearing tends to show that while the assessment against the real property in the created district was upon an acreage value within certain designated distances from the highway, that the basis used for the assessment against the railroad was a mileage basis, or that used for general taxation purposes and which under the state system of taxation includes a certain portion of personal property. While those who had made the assessment, by their testimony attempted to show that they had considered the benefits which would accrue to the railroad on account of the highway improvement, no particular basis for arriving at the benefit was shown to have been adopted other than a mere arbitrary opinion of the assessors that it would be beneficial, and retaining solely as the basis of the assessment, the mileage of the railroad within the improved district. Numerous witnesses were introduced who testified to the fact that instead of the highway being a benefit to the railroad it would be a detriment owing to the increased motor traffic which would create an intensive competition over short hauls. \* \* \*

"Inasmuch as the assessment contemplated by the act was to be upon the basis of benefits realized from the proposed improvement, the strong showing by the evidence that the highway improvement would be a detriment rather

than a benefit to the railroad company and that any benefit accruing to the railroad would be so speculative as to be unascertainable, we are of the opinion that the trial court must be sustained." (R. 175-176).

The District Court's findings of law and fact are as follows:

"1. The assessment against the property of defendant includes personal as well as real property. The inclusion of personal property is unlawful.

"2. The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws.

"3. There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway.

"4. An indirect benefit to the defendant



Railroad Company by the construction of the highway is remote, doubtful and speculative.

"5. The prayer of the bill should be granted." (R. 38-39).

## THE DISTRICT COURT'S FINDING OF FACTS SUSTAINED BY THE EVIDENCE.

The blue print introduced in evidence (R. 21) shows that the highway proposed to be improved parallels the line of railroad of the appellee for the entire distance through Franklin County; that said highway when completed would constitute a link in the highway between the Cities of Little Rock and Fort Smith, Arkansas. (R. 43-44).

It was shown by the evidence that the District embraces approximately 67,000 acres of land; that the total assessment of benefits against all the land in the District was \$575,421.35, and of this amount \$75,686.00 is assessed against 32.59 miles of Missouri Pacific Railroad Company's right-of-way, comprising 565 acres of land (R. 49); that the assessment of benefits averages \$2,322.36 per mile of main line of right-of-way, or an average rate of about \$134.00 per acre of right-of-way (R. 50); that the acreage of the right-of-way of the Railroad Company is about eight-tenths of one percent of the total area

in the District and is assessed about 13.2 percent of the total benefits fixed for the entire District; that if the same area assessment levied for all property in the District adjacent to railroad property, including towns, had been applied to the railroad right-of-way the benefits would have totalled for the railroad property embraced in the District about \$6,917.00, or 1.2 percent of the total benefits in the District, or on an average of \$212.26 per mile of right-of-way for the 32.59 miles. This would be an average of \$12.24 per acre of right-of-way. (R. 50).

The first finding that the assessment against the property of defendant includes personal, as well as real property, is shown by the certificate of the Secrteary of the Arkansas Tax Commission, and is undisputed (R. 157), and it appears that personal property to the amount of \$52,465.00 was included. (R. 156).

The second finding:

“The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of assessment is palpably

arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws."

WILL HILL, one of the assessors, testified that the assessment was made upon the basis of the assessment for general taxation purposes, and that they accepted the valuation as certified out to the County Assessor by the State Tax Commission (R. 113), and that they adopted a zone system in making the assessment:

"If the property was in a mile of the highway, we considered that as the first zone; if it was two miles, we considered that the second zone; if it was three miles we considered that the third zone, and we had a few instances where we had a fourth zone. That would reach back into the hills."

That in the first zone the assessment was made on the basis of 25 percent of the valuation, and in the second 20 percent, in the third 15 percent, and the fourth, ten percent. (R. 111).

JOHN MOSELY, assessor, testified that they were governed by the assessed value of the railroad company's property, as shown on the tax collector's book, and that was the basis upon which the assess-

ment against the railroad property was made. (R. 116).

ED B. MELTON, the other assessor, testified with reference to the increase in the assessment that it was made irrespective of any benefits that would accrue to the property; that they increased the original assessment forty percent.

"Q. Did you do that irrespective of any benefits that accrued to the property?

A. The Commissioners said they had to have about forty percent increase in taxes to finish the road. \* \* \*

Q. \* \* \* What elements were considered by you in the assessment of benefits? \* \* \*

A. We just put on forty percent, that is all.

Q. Well, you didn't consider any elements then at all as far as any benefits were concerned?

A. Just the Commissioners said they had to raise so much money and it would take forty percent, enough to finish the road, and with four or five exceptions we just added forty percent. Some poor land back in the county we didn't add forty percent. \* \* \*

Q. But as far as the railroad was concerned you didn't consider whether the railroad

would be benefited or damaged, or take into consideration any elements at all with reference to that, you merely made an increase of forty percent?

A. Yes sir." (R. 123-124).

### ROAD A DETRIMENT AND NOT A BENEFIT TO THE RAILROAD

In support of the Court's finding that the building of the parallel highway is a detriment instead of a benefit to the railroad, the attention of the Court is called to the following testimony:

R. E. WARDEN testified:

"The hard surfaced road develops competition through the use of the motor-driven vehicles, such as motor trucks for hauling freight, automobiles transporting passengers. It takes business away from the railroads. \* \* \* There is a hard surfaced road between the cities of Little Rock and Pine Bluff, for instance. There are scheduled automobile cars between the two cities carrying passengers. They don't only transport passengers over this line of highway but motor trucks haul freight. (R. 52-53).

W. W. TRIMBLE, Division Freight Agent, testified:

"At Little Rock I made personal investiga-

tion to develop the cause of loss of business between Little Rock and Benton. There is a paved road out 13 or 14 miles and the balance of the distance to Benton is a good gravel road. The last 18 months or two years there has been trucks operating between these points and they handle 90 percent of the merchandise business moving between the two towns. Before the completion of this good road and before these trucks began operating, the Missouri Pacific ran a daily pack car from Little Rock to Benton. Our records previous to the time of the truck operation shows that that car averaged from twelve to fifteen thousand pounds of merchandise each day, and we have been deprived of that traffic. \* \* \* It would average forty to forty-five dollars a day. \* \* \* The local freight still operates from Little Rock to Gurdon." (R. 73).

M. J. CROTTY, Superintendent, testified that he was familiar with the road that was being constructed by Road Improvement District No. 1 through Franklin County; that he had been over a portion of the road about a week before the trial; had been connected with the Missouri Pacific Railroad Company for 23 years and been in the railroad business about 40 years; the effect of building a parallel hard surface highway upon the traffic of

the railroad materially reduces the traffic hauled by the railroad. (R. 80-81).

"The railroad can not compete on short hauls with the motor truck, because the motor truck has absolutely no maintenance or roadway, and another thing they make street door deliveries. The merchant has the advantage of the drayage in connection with the hauling on trucks. \* \* \* In places they have hard surface roads, it has developed the country but has not increased the earnings of the railroad. In other words, it has reduced them. \* \* \* The motor truck is the strongest competitor that the railroad has in transportation." (R. 83).

C. E. CARSTARPHEN, Division Agent, testified:

"Have been connected with the Missouri Pacific Railroad Company for 35 years. Look after the general business of the company at all points in certain territory, get the traffic, and get all I can out of it. \* \* \* I have observed the effect of the building of a hard surfaced highway paralleling the railroad, and it is detracting from the traffic. \* \* \* It has deprived us of a great deal of local business where we have had certain package cars operating from a point to a point within a short distance, say 30 or 40 miles, we have practically lost all that

business. \* \* \* We have to run the trains whether we get the traffic or not." (R. 84-85).

C. L. STONE, Passenger Traffic Manager of the Missouri Pacific Railroad, testified:

"I have observed the effect of the construction of improved highways paralleling a line of railroad. (R. 95). Information tabulated from reports of our agents in the early part of 1922 and at a time when traffic was at its lowest covering regularly operated auto busses and jitneys exclusive of privately owned cars indicates that the approximate loss per annum in the State of Arkansas totals \$150,000.00. As these roads are completed from time to time naturally the loss in revenue will become greater. (R. 96). \* \* \* It is not always true that anything that develops a territory which a railroad serves must necessarily be of benefit to the railroad. In the case of good roads paralleling a common carrier it is a detriment to the carrier. On the other hand, if good roads are built out into the country for the purpose of bringing people and products to the railroad station, then I would say it would be a benefit." (R. 96.)

D. R. LINCOLN, Assistant Freight Traffic Manager, Missouri Pacific Railroad Company, testified:

"I have observed the effect of building im-



proved highways paralleling the lines of the Missouri Pacific Railroad in Arkansas. The effect of the construction of such improved highways has been to seriously curtail the tonnage of the railroad company. With the completion of such improved highways, and after they have been opened for public use, there has developed keen competition with automobile trucks operated by individuals and companies for the transportation of merchandise." (R. 97).

The entire evidence in the case has been incorporated in the record, under stipulation of counsel, and approved by the Court (R. 167), and we submit that the evidence fully supports the third paragraph in the findings of fact made by the District Court to the effect:

"There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway." (R. 39).

## BRIEF OF THE ARGUMENT

### PARALLEL HIGHWAY A DETRIMENT RATHER THAN A BENEFIT TO A RAILROAD.

We have quoted from the testimony of the witnesses who were in a position to know, including traffic men from both the passenger and freight department of the railroad. The evidence conclusively establishes that the highway parallels the railroad, and it is a fact that can not be controverted, and from the testimony of the witnesses on behalf of the railroad it is further established beyond question that a parallel highway is a detriment instead of a benefit to a railroad. This fact is a matter of such general knowledge that the Courts will take judicial notice of it.

The late President Harding, in his last message to Congress, as reported in Congressional Record of December 8, 1922, says:

"We ought to turn the motor truck into a railway feeder and distributor instead of a destroying competitor. \* \* \*

Yet we have paralleled the railways, a most natural line of construction, and thereby taken away from the agency of expected service much of its profitable traffic, for which the taxpayers

have been providing the highways, whose cost of maintenance is not yet realized.

The Federal Government has a right to inquire into the wisdom of this policy, because the National Treasury is contributing largely to this highway construction. Costly highways ought to be made to serve as feeders rather than competitors of the railroads, and the motor truck should become a co-ordinate factor in our great distributing system."

It is a matter of common knowledge that motor trucks and automobiles carry freight and passengers. The only business of a railroad is transportation. Its only income is derived from the traffic it transports. The value of its property depends upon the amount of the net revenue arising from such traffic. Anything which deprives it of traffic is a detriment and not a benefit.

The testimony of the passenger traffic manager of the railroad shows that the proximate loss during the year 1922 of passenger traffic on account of automobiles being operated in competition with the railroad in Arkansas would deprive the railroad of passenger traffic, the revenue from which would amount to \$150,000.00 a year, and the witness made the further significant statement:

"As these roads are completed from time to

time, naturally the loss in revenue will become greater."

Much stress is laid by counsel for appellant upon the case of *Branson v. Bush*, 251 U. S. 182. However, in that case, the highway was not a parallel one, but one which extended from the railroad into the interior of the country, and there was no evidence introduced as to a loss of traffic that would occur on account of the construction of that road. In fact the Court in its opinion in that case stated:

"It is a significant fact that no traffic man was called,"

and in that case there was no assessment made by a Board of Assessors under the provisions of the Act which required them to assess only, as provided in Section 9 of the Act involved in the case at bar, the "value of all benefits to be received by each land owner by reason of the proposed improvements, as affecting the lands, railroads and tramroads, telegraph lines, telephone lines within the District." (R. 4).

In the *Branson v. Bush* case there was a legislative determination in advance of the benefits that would accrue to the property in the District. Section 5 of the Act involved in that case, and which is quoted in the opinion of the Court, provides:

"It is ascertained and hereby declared that all real property within said District, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as apportioned in the county assessment of each piece of property within the District for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized;"

In the later case of *K. C. S. Ry. Co. v. Board of Improvement District No. 6, of Little River County, Arkansas*, 256 U. S. 658, there was involved an assessment of benefits against the property of the railroad company made by a Board of Assessors as provided in the Act involved in this case, and the Court said:

"The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position, and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the prop-

erty of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system.

Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to \$67,900 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. (Citing cases.) It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it can not be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely accordingly to area and position. Railroad prop-

erty may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

The assessors in the case at bar testified that they divided the territory embraced in the District into four zones (R. 11), and irrespective of any benefits that would accrue to any particular property, and particularly the railroad property, they adopted the assessment made for general taxation purposes, as it appeared upon the tax books (R. 110), as a basis for making the assessment of benefits. (R. 116). They did not consider the fact that the building of the road would develop competition for the railroad, or what effect the building of the highway would have upon the traffic of the railroad. (R. 118). And the increase in the original assessment of forty percent was likewise made upon an arbitrary basis, as one of the assessors testified that they were advised by the Commissioners that it would require forty percent more to complete the road (R. 123), and that they did not take into consideration any benefits that would accrue to the property in the District when the increase was made.

(R. 123-124). One of them testified in answer to the question:

"What was your opinion based upon? What facts were taken into consideration in forming or reaching your conclusion that the property of the railroad would be benefited?

A. The improvement of the country and the hauling they would get in doing the improvement and buildings, such as that.

Q. You took those facts into consideration that the haulage would be greater if the road was built?

A. Yes sir.

Q. Did you take into consideration the fact that it would develop competition by motor trucks?

A. I don't remember whether we did or not."  
(R. 116).

Another assessor testified in answer to the last question:

"I don't think we did." (R. 118).

The method pursued by the Board of Assessors in this case has been so often condemned by the Courts generally that the citation of authorities



on the subject would be useless, but we submit that by an overwhelming amount of evidence it is not only demonstrated that the railroad would not be benefited by the construction of this parallel highway, but that it would be a detriment, and no benefits would accrue to it that could be made the basis for an assessment of benefits against its property.

THE ACT OF THE LEGISLATURE CREATING  
THE DISTRICT ONLY AUTHORIZES AN  
ASSESSMENT ACCORDING TO "THE VALUE  
OF ALL BENEFITS TO BE RECEIVED.."

Under the above provision, if no benefits accrue to any particular property, it cannot be assessed.

The Supreme Court of Arkansas, in numerous opinions, has so declared the law:

"Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, says Judge Dillon, is the true and only solid foundation upon which local assessments can rest. They are based upon the assumption that the persons upon whose property they are imposed are **SPECIALY** and **PECULIARLY** benefited in the enhancement of the value of their property by the expenditure of the money collected on

the assessmnet, and while they are made to bear the cost of the local improvement, they, at the same time, *suffer no pecuniary loss thereby.*"

Rector v. Board of Improvement, 50 Ark. 116-129.

"The benefits need not be exclusive; the general public may also derive benefits in a more remote degree, yet if there is a *special* and *peculiar* benefit inuring to adjoining property, local assessments are justified."

Shibley v. Fort Smith & Van Buren Dist., 96 Ark. 410-416.

"We have never held, nor are we aware that any other court has ever held, that assessments of local improvements may be assessed according to value as such, but such assessments are always sustained distinctly upon the assumption that the benefits will accrue in proportion to such value."

Alexander v. Board of Directors Levy Dist., 97 Ark. 322-331.

"The benefits must be special and peculiar, and if there are no special and peculiar benefits, the assessment cannot be made."

Board of Improvement v. Pollard, 98 Ark. 543-549.

It was held in *Myles Salt Co. v. Iberia Drainage District*, 239 U. S. 478, that power, arbitrarily exerted, imposing a burden without a compensating advantage of any kind, amounts to confiscation and violates the due process clause of the Fourteenth Amendment.

In *Gast Realty Company v. Schneider Granite Company*, 240 U. S. 55, the Court said:

"The Legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse."

#### "THE BENEFITS FIXED BY LEGISLATIVE DETERMINATION"

Under this caption in the brief on behalf of the appellant counsel for appellant says:

"However the legislature of the State of Arkansas at its 1921 session, passed Act No. 626 \* \* \* approved March 29, 1921."

This statement is followed by quoting the Act of the General Assembly of the State of Arkansas approved March 29, 1921, and also the Act approved February 12, 1923, which again attempted to con-

firm and validate the original assessment of benefits, and the increase thereof, as made by the Board of Assessors acting under the authority of the later Act. There was no answer filed to the amendment challenging the constitutionality and the validity of this later Act of the Legislature (R. 33), and among other allegations in said amendment appears the following:

“Because said Act is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that ‘No state shall deny to any person within its jurisdiction the equal protection of the law,’ and which also provides that ‘No state shall deprive any person of life, liberty or property without due process of law.’ That this complainant’s property would not be benefited by the construction or improvement of said road; that said road, if improved, would be a detriment instead of a benefit to this complainant’s property in said Road Improvement District, in that it would deprive this complainant of both freight and passenger traffic, and therefore said assessment of benefits against its property would be and is confiscatory and would deprive it of its property without due process of law. (R. 36) \* \* \*

That the Legislature in passing said Act

transcended its authority by attempting to find that the assessment of benefits that were made in said district 'is hereby found to be fair, equitable and just as made and is hereby in all things confirmed and declared to be the benefits accruing to the property therein assessed,' when the original Act provided an appeal to the courts for the purpose of determining the fairness and justness of said assessment of benefits. That said defendants and said Commissioners knew at the time that they caused said Act to be introduced and passed by the Legislature that a suit was pending in this Court in which the issue was involved as to the fairness and justness of said assessment, and was an attempt to deprive this complainant of its property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States. (R. 37.)

\* \* \*

That said Act of the Legislature attempting to confirm said assessment of benefits and attempting to grant to the assessors the powers to increase said assessment and to re-assess said property, and the Act approved February 12, 1923, attempting to validate and confirm said re-assessment of property, and the original assessment as made by the Board of Assessors is demonstrably erroneous, confiscatory, discriminatory, unfair, unjust, inequitable, excess-

ive, exorbitant, palpably arbitrary, a flagrant abuse of the powers of the assessors under both of said Acts for the reasons stated in the amended and substituted bill filed herein, and that complainant herein is aggrieved by the action of said Board of Assessors in making said assessment, and by the Acts of the Legislature in attempting to confirm and validate said assessments as made by said Board of Assessors in assessing said property is in violation of Section One of the Fourteenth Amendment to the Constitution of the United States hereinbefore referred to." (R. 38).

The further suggestion under this head appears in brief for appellant:

"The District Court in this case did not undertake to find that the legislative determination of benefits against the property of the plaintiff under the provisions of these acts was wholly unwarranted, a flagrant abuse of authority or confiscatory; but merely found that the methods of assessment employed by the assessing board of the district was arbitrary and discriminatory because made upon a different basis from that used in assessing other real estate in the district."

The District Court made the following finding:

"The assessment against the real estate of

the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws." (R. 39).

The District Court further found:

"There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary, there will be a loss to it in freight and passenger traffic by reason of the construction of the highway." (R. 39).

The case of *Branson v. Bush*, *supra*, is again cited, but in that case the Court stated:

"The subject was carefully re-examined and the law restated in cases so recent as *Phillip Wagner v. Leser*, 239 U. S. 207, 60 L. ed. 230, 36 Sup. Ct. Rep. 66, and *Houck v. Little River Drainage Dist.* 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the 14th Amendment only where the

legislative action is 'arbitrary, wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character a confiscation of particular property.' "

And the case of *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, is cited, and there again appears the qualification to the rule that the determination of the Legislature with reference to benefits that will accrue to the property by reason of the improvement contemplated by an Improvement District "can not be assailed under the Fourteenth Amendment unless it is wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property."

The evidence is conclusive that the highway in this case will be a detriment instead of a benefit to the railroad company, and therefore, to tax the property would be mere confiscation, and come within the terms of every decision of the Courts in which an assessment of benefits under such circumstances is condemned.

The Supreme Court of Arkansas, in the case of *Bush v. Delta Road Improvement District*, 141 Ark. 253, says:

"In the case of *Coffman v. St. Francis Drain-*



age District, 83 Ark. 54, the Legislature created the district, fixed the boundaries thereof, and made the assessment. It was there claimed that the act of the Legislature was such an arbitrary abuse of the taxing power as would amount to a confiscation of the plaintiff's property without any benefit whatsoever to him. The court held that, while the Legislature, in creating a drainage district, may provide what lands shall be assessed for the improvement, and the extent of such assessment, the court will interfere where the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of property without benefits. In that case as we have already seen, the assessment of benefits was made by the Legislature, and it was held that the courts could review the action of the Legislature upon proper allegations and proof showing that the proposed district amounted to a confiscation of the plaintiff's land."

The Court in the case of *Wagner v. Leser*, 239 U. S. 219, in its opinion said:

"We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land-owners, because of arbitrary and wholly unwarranted legislative

action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise."

It appears from the evidence in this case that the assessment of railroad property is made by the State Tax Commission, and not by the County Assessor (R. 113), and that railroad property is assessed by the mile. (R. 156).

### PARALLEL HIGHWAY

It is suggested under the above caption:

"If it be said that the highway constructed by the defendant district parallels the line of the plaintiff's railway, then we answer that the only effect of this, as shown under the undisputed testimony in this case, is to develop, improve and increase the prosperity of the community adjacent to the highway and railroad, and thereby necessarily result not in 'an indirect, remote, doubtful and speculative benefit' to the property of the railroad company, but, as shown from the admission of the employees of the plaintiff's traffic department, as well as the testimony of the other witnesses in the case,

will result in a direct, substantial and ever-increasing benefit, with the possible loss in small business and short hauls far more than offset by the continuing growth of the plaintiff's general and more profitable business."

Statements of this character are so directly in conflict with the evidence that we deemed it necessary to make a statement and abstract of some of the evidence with references to the pages of the record. There are a great many other statements of like character, but the evidence upon which the Court based its decree in this cause sufficiently answers such statements, and relieves us of the necessity of calling this Court's attention to each of the unwarranted statements of this character found in the brief on behalf of the appellant.

The suggestion in these statements is that the railroad should be taxed on account of a community benefit which would result from the building of the road, and not those "special and peculiar benefits" which the law of Arkansas only recognizes as a basis to justify an assessment of benefits against any property.

"IN NO EVENT SHOULD PROPERTY OF THE  
RAILROAD COMPANY <sup>W. H. Hall</sup> ~~ONLY~~ ESCAPE TAX-  
ATION FOR THIS PUBLIC IMPROVEMENT."

Under this caption in appellant's brief, the case of Kansas City Southern Ry. Co., et al, v. Road Improvement District No. 3 of Sevier County, 266 U. S. 380, is cited as an authority in support of this statement. In that case this Court in its opinion says:

"The road in question extends, at right angles to the railway line, a distance of 18 miles into a country well adapted to supplying large traffic for the railway when the improvement is completed. Adjacent to the road, as is conceded in the brief for the railway companies, are 1,587 tracts of farm lands of less than 80 acres and 246 tracts of a larger acreage. The only practicable route to available markets is through DeQueen and over the railway. These facts, together with the affirmative evidence of what was undertaken and done in the way of growing new crops and shipping them out over the railway as soon as the improvement was well under way, illustrate that there was a real basis for assessing the railway property at DeQueen with substantial benefits."

The facts in that case demonstrated that the

highway was a "feeder" to the railway and not a destroying competitor as in the case at bar.

The appellant in its brief quotes a garbled portion of the cross-examination of C. E. Carstarphen, Division Agent of the Missouri Pacific Railroad Company. By referring to the record (pp. 85, 86) he testified:

"Q. Have you observed in your experience, do you know of any specific instances where the building of such a road paralleling the railroad has had the effect of taking away its traffic?

"A. Well, I might recall the first hard surface road built in this country.

"Q. What effect did that have?

"A. Absolutely took it all. Somebody did. We haven't had any since it was completed.

"Q. Do you know what the amount of traffic was before the building of the road?

"A. No, I couldn't state as to that. I know prior to the building of the hard surface road that we had a car every day between Fort Smith and Van Buren. The freight hauled in that car was made up here from the different jobbers in all the different lines, and it was loaded that day and got out that

night and delivered in Van Buren either that night or next morning. After the hard surface road was built the business gradually decreased until at this time I don't presume there would be over 5 per cent of the traffic moving between Fort Smith and Van Buren aside from business that is delivered to us by connecting lines, that is, that is hauled from one railroad to the Missouri Pacific depot and goes to Van Buren that way.

"Q. But from the local wholesale houses in Fort Smith?

"A. Nothing, absolutely nothing.

"Q. How is the freight transported?

"A. By motor truck. Prior to the motor truck it was hauled by wagon."

And on re-direct examination, he testified:

"Q. I understood you to answer Judge Evans that some of that freight is carried at a loss by the railroad? Did you make that statement?

"A. Well, in this way: Some times these cars are loaded very heavy. Sometimes they have ten or twelve thousand pounds in them. In a case of that kind it is very profitable,

but where it gets down to five hundred or a thousand pounds then it would not be profitable.

"Q. If you have to haul the car and you run the train anyway, does it cost you any more?

"A. No.

"Q. Aren't you required to run daily local freights?

"A. Yes.

"Q. Does it cost any more to operate one of them when they are hauling heavy traffic, than when they are hauling empty cars?

"A. I shouldn't think it would since they have got to make the trip anyway." (R. 90).

When the entire evidence is considered in this case and under the Act of the Legislature creating this Road Improvement District, limiting the assessment to the benefits that would accrue, there is no escape from the conclusion that the Court was correct in holding that the building of this road would be a detriment instead of a benefit to the property of appellee.

## CONCLUSION

In conclusion we respectfully submit that the findings of fact and declarations of law made by the trial Court in this case are fully sustained by the evidence and the law:

- (a) "The assessment against the property of defendant includes personal as well as real property. The inclusion of personal property is unlawful."

It is an admitted fact that personal property to the extent of \$52,465.00 was included. (R. 156).

"It must readily be conceded, and it is conceded by appellee, that taxation for local improvement must be confined to real estate to be benefited by the proposed improvement. Personal property is not subject to taxation for that purpose, nor was it attempted in the enactment of the statute under consideration to tax personalty."

Fort Smith Light & Traction Co. v.  
McDonough, 119 Ark. 254.

"The question is, therefore, squarely presented whether or not personal property can be subjected to taxation for local improvements. This has not heretofore been attempted in this



State, as we have already said, nor can we find in the books any example of an attempt in other states to tax personal property as such for the purpose of defraying the expenses of local improvements."

Snetzer v. Gregg, 129 Ark. 546.

- (b) "The assessment against the real estate of the defendant is on a mileage basis. The valuation for general taxation is taken. The assessment against other real estate is upon an area basis at a certain amount per acre, dependent upon distance from the highway contemplated. This method of assessment is palpably arbitrary and discriminatory and results in a denial to the defendant of equal protection of the laws."

The evidence is conclusive as to the method adopted by the assessors, and the authorities cited sustain the Court in its finding that such a method is "palpably arbitrary and discriminatory, and results in a denial to the defendant of the equal protection of the laws."

- (c) "There will be no direct benefit to the property of the Railroad Company by the construction of the highway. On the contrary there will be a loss to it in freight and passenger traffic by reason of the construction of the highway."
- (d) "An indirect benefit to the defendant railroad

company by the construction of the highway is remote, doubtful and speculative."

The finding of fact by the Court that the railroad would suffer "a loss to it in freight and passenger traffic by reason of the construction of the highway," is not only warranted by the evidence, but no other reasonable conclusion could be reached from the evidence.

The testimony of the ~~passenger~~ traffic agent of the appellee is not disputed, that an investigation conducted by him to ascertain the reason for the loss of business between Little Rock and Benton, Arkansas, a distance of only twenty miles, revealed the fact that the improved highway between the two places had enabled the motor truck to absorb that traffic which had formerly produced a net revenue of from \$40.00 to \$45.00 per day (R. 73); that the same train is still operated at the same expense, but without this revenue.

We submit that the evidence in the record shows conclusively that the decree is based upon the evidence and should be affirmed.

Respectfully submitted,

EDWARD J. WHITE,  
THOMAS B. PRYOR,

*Attorneys for Appeller*

# SUPREME COURT OF THE UNITED STATES.

No. 38.—OCTOBER TERM, 1926.

Road Improvement District No. 1 of Franklin County, Arkansas, et al., Appellants,	} Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.
<i>vs.</i> Missouri Pacific Railroad Company.	

[April 18, 1927.]

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to annul an assessment of benefits accruing to a railroad from the improvement of a public road in Franklin County, Arkansas.

The improvement was undertaken by a road district created for the purpose by an act of the state legislature directing that the cost be distributed over the lands, railroads and other real property within the district, in the form of special taxes measured by benefits received. Act 588, Special Road Acts 1919. The benefits were to be assessed by the district's assessors; and any owner aggrieved by their action was to have a right for twenty days to sue in a court of competent jurisdiction to set aside the assessment against his property. Otherwise it was to be "incontestable either at law or in equity."

The assessors originally assessed the benefits to the railroad at \$54,062.00; and the railroad company in due time brought this suit to annul that assessment—on the grounds, among others, that it was plainly arbitrary and unreasonably discriminatory and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

While the suit was pending the state legislature confirmed the assessments, specifically including that against the railroad, and authorized additional assessments, to be made conformably to the

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County, Ark., et al. vs. Missouri Pacific R. R. Co.*

first act, to meet the cost of proposed changes in the width of the road-bed and in other features of the improvement. Act 626, Special Acts 1921. The proposed changes in the plans were made and additional assessments ensued. In this way the total assessment against the railroad came to be \$75,686.00. The legislature passed an act confirming and approving the additional assessments, again specifically including that against the railroad. Act 109, Special Acts 1923. In supplementary bills, filed by the court's leave, the plaintiff set forth the additional assessment and the legislative confirmations, and challenged their validity on the same grounds that were advanced against the original assessment.

On the hearing much evidence was produced; and the District Court found that the assessment against the railroad was plainly arbitrary and unreasonably discriminatory, and on that ground entered a decree setting it aside and enjoining the defendants from attempting to collect any tax based thereon. The Circuit Court of Appeals concurred in the finding and affirmed the decree. 2 F. (2d) 340.

The defendants bring the case here, their contentions being (a) that the legislative confirmation of the assessment is controlling; (b) that the court below erred in finding that the assessment was plainly arbitrary and unreasonably discriminatory; and (c) that if the assessment was excessive, either in itself or when compared with the assessments against other property, it should be not wholly set aside but reduced to the extent of the excess.

There can be no doubt that the legislative confirmation placed the assessment on the same plane as if it were made by the legislature, and thereby cured any mere irregularities on the part of the assessors; but, as the legislature could not put aside or override constitutional limitations, the confirmation did not prevent inquiry into the alleged violation of such limitations.

If, as found by the courts below, the assessment was plainly arbitrary and unreasonably discriminatory, it was in violation of both the due process and the equal protection clauses of the Fourteenth Amendment; so we turn to the complaint of that finding. As the courts below concurred in the finding on successive examinations of the evidence it should be accepted by us unless shown to be clearly erroneous. *Washington Securities Co. v. United States*, 234

U. S. 76, 78; *Baker v. Schofield*, 243 U. S. 114, 118; *United States v. State Investment Co.*, 264 U. S. 206, 211; *Norton v. Larney*, 266 U. S. 511, 518.

The road district extends across Franklin County from east to west along the Arkansas River and is five or six miles wide. The public road which is being improved traverses the district from east to west, is 24 miles long, practically parallels the railroad and touches the same towns. The improvement consists in reducing curves and grades, widening the road-bed and giving it a rock base and hard surface adapted to use at all seasons by all kinds of vehicles, whether drawn by animals or propelled by motors. The road is intended to be part of a projected hard-surface highway extending from Little Rock to Fort Smith, as the railroad does. The area of the road district is 67,000 acres and that of the railroad right of way therein is 565 acres, or eight-tenths of one per cent. of the whole. The benefits assess<sup>d</sup> to property in the district aggregate \$575,421.35, of which \$75,686.00, or 13.2 per cent., is assessed to the railroad.

The assessment to the railroad is not based on real property alone, but also on rolling stock and other personalty valued at \$52,465.00, while all other assessments are confined to real property. In this there is an obvious and unreasonable discrimination. Further discrimination is said to be shown by testimony indicating that the assessors fixed the benefits to the railroad on a mileage basis regardless of area, and as to other property proceeded solely with regard to area. But this testimony must be put aside by reason of the legislative adoption of the assessments. The modes in which the assessors arrived at the amounts assessed were not shown on the assessment roll or communicated to the legislature; so the question of discrimination must be determined independently of the theories and processes of the assessors, as if the assessments were made directly by the legislature.

Most of the testimony is addressed to the questions whether and how far the railroad will be benefited by the intended improvement of the parallel public road. Some witnesses are of opinion there will be no benefit, and a few that there will be great benefit. These are extreme views and are weakened, rather than supported, by further statements of the same witnesses. Other testimony in

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substantial volume, coming from witnesses informed by observation and experience, is to the effect that, while an increase in particular traffic with accompanying revenue reasonably may be expected, it will be less than would be realized if the highway extended away from the railroad and reached localities theretofore without such a road; that, unlike such a lateral feeder, the parallel road reaching the same towns as the railroad will through its ready use by motor-driven vehicles withdraw from the railroad much of the less-than-car-load freight between these towns, and much of the passenger traffic between them; that such has been the actual result in similar situations along this and other railroads in Arkansas and other States, specific instances being described; and that the loss to this railroad in the instances described has ranged from 50 to 90 per cent of such local traffic and compelled a cessation of part of the service to which it was incident. The successful competition of motor trucks in these situations is explained on the grounds that they do not bear the cost of constructing and maintaining the roadway, and are able to receive and deliver freight at the street door and to relieve their patrons from drayage charges. The view that the improved road will be of mixed benefit and detriment to the railroad is not confined to the plaintiff's witnesses but shared by informed witnesses called by the defendants. One of these, a member of the State Highway Commission and familiar with the particular situation and the development in the locality, testifies: "Q. What in your opinion is the effect of building this highway upon the revenue of the Missouri Pacific Railway? Will it be a detriment to it, or will it not be a benefit? A. Well from some standpoints a benefit, and from others perhaps a detriment, but as a whole perhaps a benefit."

From all the testimony we think there is ample ground for believing that the improved road will lead to an increase in the traffic and revenue of the railroad, as respects freight moving in car-load lots and passengers travelling considerable distances, but that the benefit from this will be cut down by a substantial loss in local freight and passenger traffic attracted to motor-driven vehicles moving over the improved road. That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony but is common knowledge.

It received distinct recognition in the President's message of December 8, 1922, to Congress.

We think it also appears from the testimony that the increase in revenue reasonably to be expected will be greater than the loss, but that the excess will not be such as to justify an assessment of benefits of \$75,686.00 or more than a small fraction of that sum. Indeed, on the present showing, we should regard an assessment in excess of \$15,000.00 as passing the outside limit of reasonable judgment and plainly arbitrary.

Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and that it is otherwise so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause of the same amendment. In these respects the finding and holding below are well grounded.

It follows that the present assessment is invalid and an injunction should be granted against its enforcement. The District Court so decreed. But as, on the present showing, it appears that an assessment of some benefits—in an amount certainly below \$15,000.00—would be justified, the way should be left open for making a new or revised assessment. The defendants ask, if the present assessment be held excessive, that it be reduced in this suit to a proper sum. But to this we do not assent. The state statute commits the assessing of benefits to a special non-judicial board of assessors, and authorizes that board, when requested by the commissioners of the district, to revise their assessments by “increasing or diminishing the assessment against particular pieces of property as justice requires.” Act 588, sec. 10, Special Road Acts 1919. The better course is to leave the making of a substituted or revised assessment to that board. The decree will be modified by including a provision that it is without prejudice to a lawful revision of the assessment conformably to the state statute and not exceeding \$15,000 in amount.

*Decree modified and affirmed as modified.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*